The Central Law Journal.

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CHARLES DENBY.

Above we present to our readers a portrait of an old and esteemed subscriber and occasional contributor to this journal, who has lately been honored by being appointed our minister to China. He was born in Botetourt county, Va., and is now about fifty-five years of age. His education included three years at Georgetown College, in the District of Columbia. Afterwards he entered the Virginia Military Institute, where he graduated with high honors. He was a professor in the Masonic University at Salem, Ala., until 1853, when he located at Evansville, Indiana, and edited the *Daily Enquirer*, the first Democratic daily published in Evansville. While editing this paper for his support, he began the study of the law in the office of the late Gov. Baker, of Indiana, who was then a practicing attorney in Evansville.

In 1856 he was elected a member of the Indiana legislature. When Sumter fell, in 1861, he recruited the 42nd Indiana volunteer regiment, and was appointed Lieutenant Colonel. After the battle of Perryville, in which action his regiment took an active part, he was promoted to colonelcy of the 80th Indiana regiment. In 1863 he resigned from the army on account of physicial disabilities and returned to Evansville, where he resumed the practice of the law. He has ever since devoted himself exclusively to his profession. In 1876 and 1884 he was delegate at large to the Democratic conventions held in those years. He has been several times requested to accept the nomination for Congress, but refused, preferring to continue the practice of the law to engaging in active politics. For sixteen years last past, Col. Denby has been the senior member of the law firm of Denby & Kumler, composed of himself and Daniel B. Kumler.

He is distinctively a lawyer and has few superiors in his profession at the Indiana bar. His practice has been very large and general, and his knowledge of the law is not confined to any one branch, but extends through all. He is a close student and a hard worker, and is particularly qualified for his new duties as minister to China. His appointment has been received with great favor, and has been pronounced by all acquainted with him to be an exceptionally good one.

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CURRENT EVENTS.

MEETINGS OF JUDGES.—The circuit judges of Missouri meet annually for consultation as a voluntary association, and make recommendations to the legislature touching incongruities in the laws, which the individual judges are required by law to make. These recommendations receive, as a general rule, about the same attention from the legislature which the written instructions of judges receive from juries: they go into the legislative waste basket. In Ohio the circuit judges are required by law to meet annually, and the date of their annual meeting is fixed at the third Tuesday of August, as we learn from the *Weekly Law Bulletin*. The *Bulletin* does not, however, state the purposes for which the law of that State requires the judges to meet.

REFORMING THE INNS OF COURT.—There seems to be considerable unanimity in favor of the movement of the junior members of the Inner Temple concerning the manner of constituting the governing bodies of the Inns of Court, by coming down to the system, at once natural, sensible and just, of having the benchers elected by the members and, not by themselves. The *Law Journal* adds its sanction to the movement in the following language: "The junior members of the Middle Temple have begun a movement for the reform of the constitution of their governing body which is likely to have far-reaching results. With the respect of lawyers for vested interests, they expressly 'save the rights of existing masters of the bench,' but insist that in future 'all elections shall be made in the ordinary way by the votes of members of the society, and that the accounts of the revenues and expenditure of the society shall be duly audited and published.' The proposal is simple and moderate. The Inns of Court are the oldest clubs in London, and were constituted before there was such a thing as club law; still in their main functions they are neither more nor less than clubs, and their governing body must submit to the principles which obtain universally in all such bodies. The only respect in which they differ from clubs is in possessing the right of call to the bar. This is lodged in the society, not in a governing body of any particular form, and there is no reason to suppose that a bench selected by the votes of the whole Inn would perform this duty worse than the present benchers, many of whose interest in the law is purely historic. The Temple supplies a better leverage for the movement than Lincoln's Inn or Gray's Inn, as its property is held under a charter of James I., which expressly devotes it to the use of law students and practitioners."

A MONSTROUS DECISION.—A learned correspondent writes to ask us to what decision we referred in an editorial in this journal,[1] in which we stated that the Supreme Court had, "by a bare majority, rendered a monstrous decision which places the most venerable State in the Union at the feet of the Federal district judges." Need we say that we referred to the decision of that court in *Poindexter v. Greenhow*, the *syllabus* of which was given in a former number of this journal,[2] and upon which we took occasion to comment editorially in a later number.[3] Under the stress of that decision, whether the State of Virginia can carry on her State government depends upon the volume of past due coupons which are out under the funding law of that State, which law embodies a contract which that decision specifically enforces against the State. If we understand the law aright, not a dollar of taxes can be collected from any taxpayer who tenders those coupons in payment. The power of the State of Virginia to carry on her present State government is thus made to depend upon the question how far a previous legislature was provident or improvident in surrendering her sovereign right to raise revenue. We understand that the Federal district judges, holding the Federal circuit courts in Virginia, are now enforcing the principle of that decision, by enjoining the tax collectors from destraining personal property or from selling real estate for taxes, where those coupons are tendered in payment. We submit to the candor of the legal profession, without reference to any past division of opinion upon political lines, that this is a monstrous decision under which the sovereign rights of the most venerable State in the Union have been stricken down; that it is a decision which destroys the last vestige in our system of what has been called State sovereignty, and reduces the States of the Union to the attitude of mere municipal corporations; that it places a sword in the hands of the Federal judiciary which may at once be turned against the strongest as well as the weakest State in the Union. It may be turned against any State whose legislature is improvident enough to furnish a basis for it. It may in time be turned against Texas, or Missouri, or New York. It is a sword facing in every direction and turned against all, and we are all interested in opposing it.

[1] *Ante*, 102.

[2] 20 Cent. L. J., 417.
[3] Ib. 454.

NOTES OF RECENT DECISIONS.

STATUTES. [INTERPRETATION.]—WHEN THE WORD "MAY" IS TO READ "SHALL."—A statute of Maryland runs as follows: "If any security, or any counter-security of an executor or administrator, or any person interested in the estate of any such security, or counter-security, shall conceive himself in danger of suffering from the securityship, he may apply to the Orphans' Court which granted the administration, and the said court may require the party to give counter-security, to be approved by the court," etc., etc.[4] It is held that the word "may" in this statute is imperative, and that the power thus conferred upon the court is not one which it can exercise or decline as a matter of discretion. In the opinion, which is given by Yellott, J., the court discuss the question in what cases the word "may" in a statute will be equivalent to "shall" or "must" as follows: "The word 'may' in the statute was construed by the Orphans' Court as mandatory and obligatory, and therefore leaving no margin within which there might he an exercise of discretionary powers. This construction is in strict conformity with the interpretation of the same phraseology found in an Act of Parliament in Alderman Backwell's Case,[5] an interpretation which seems to have been subsequently respected and adopted in all similar cases in England and in this country. In that case the creditors of Backwell, by petition, asked for a commission of bankruptcy against him, and the lord keeper ordered that a commission should issue unless cause to the contrary were shown within a designated period. An application was afterwards made for a suspension of the operation of this order, so as to afford an opportunity for an investigation and ulterior arrangements. But 'the lord keeper declared, that though the words in the Act of Parliament were, that the chancellor *may* grant a commission of bankrupt, yet that (*may*) was in effect (*must*), and it had been so resolved by all the judges. And the granting of a commission was not a matter discretionary in him, but that he was bound to do it.' In Rex & Regina v. Barlow,[6] there was an indictment for non-performance of duty designated by statute; and as matter of defense it was contended that the word *may* in the Act of Parliament, rendering the performance optional, the omission to perform did not present a proper case for criminal procedure. But the court held that 'where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall*.' A similar construction may be found in a multitude of English authorities recognizing this principle as applicable in analogous cases.[7] In Stamper v. Millar,[8] Lord Hardwicke draws a distinction between private trusts, created by deed or otherwise, and duties imposed by statute. The chancellor intimates that the word *may* in the former often leaves scope for the exercise of an election by the trustees, while in the latter the same word imports obligation. There seems to have been a recognition of this principle as constituting a fundamental rule of construction in all the American cases in which the question has been presented.[9] This court has on several occasions declared the principle of construction to be that "Where a statute confers power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words 'power and authority,' in such case, may be construed duty and obligation."[10] In Mason v. Fearson,[11] the words 'it shall be lawful' have a construction which gives them a mandatory operation. In the more recent case of The Supervisors of Rock Island Co. v. United States,[12] is found an elucidation of the principles of construction by the Supreme Court which renders apparent the reason of the rule. The court says: 'The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act be-

[4] Md. Code, Art. 91, § 1.
[5] 1 Vernon, 152.
[6] 2 Salk. 609.
[7] King v. Inhabt. of Derby, Skinner, 390; Rex v. Commissioners of Flackwood Inclosure, 2 Chitty, 251; Dwarris on Statutes, 712.
[8] 3 Atk. 212.
[9] Newburgh Turnpike Co. v. Miller, 5 John. Ch. 113; Mayor, etc., of City of New York v. Furze, 3 Hill, 612; Malcom v. Rogers, 5 Cow. 188; The People v. Supervisors of Columbia Co., 10 Wend., 363.
[10] Mayor & C. C. of Balt. v. Marriott, 9 Md. 160; Mayor & C. C. of Balt. v. Pendleton & Harlan, 15 Md. 12; Comm's of Pub. Schools v. County Comm'rs of A. County, 20 Md. 449; County Commissioners of A. A. Co. v. Duckett, 20 Md. 468.
[11] 9 How. 248.
[12] 4 Wall. 435.

fore us, or in equivalent language—whenever the public interests or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty.' The statute certainly gives the appellees the right to ask for counter-security. It also says that the Orphans' Court *may* enforce that right in the manner prescribed. The authorities already cited decide that the word "*may*" when so used is mandatory; and such was the construction which controlled the action of the Orphans' Court. The recognition of this rule of construction was strictly proper and correct."

HOMESTEAD. [CONVEYANCE]—DAMAGES NOT RECOVERABLE FOR BREACH OF CONTRACT TO CONVEY.—No court could have any difficulty in holding that the contract of a husband to make a conveyance of land which is his family homestead, will not be specifically enforced in equity, where the statute prohibits a conveyance of the homestead without the concurrence of the wife, and where the wife of the party entering into an obligation so to convey, has not concurred therein. But there is more difficulty in upholding the decision of the Supreme Court of Iowa in *Cowgell v. Warrington*,[13] where it was held that in such a case damages would not be given against the husband for his breach of his contract to convey. The Iowa statute provides that "a conveyance or incumbrance (of the homestead) by the owner is of no validity, unless the husband and wife, if the owner is married, concur in and sign the same joint instrument.[14] The court in reaching this conclusion reason, according to its opinion delivered by Beck, C. J., as follows: "It is declared in the section just cited, that a conveyance for the sale of a homestead, unless the wife concurs in and signs it, 'is of no validity.' Defendant bound himself to execute a conveyance which, under the law, would have been void. Surely plaintiff can recover no damages for the failure of defendant to execute a void deed. But, if the contract is to be regarded as a conveyance, it is equally plain that defendant is not liable for damages thereon, for the reason that it is void. It will be remembered that the plaintiff paid defendant nothing under the contract. Plaintiff holds no such equity as a creditor. He has lost nothing by the contract. He is simply endeavoring to recover against defendant upon a contract which the law declares is void. He was bound to take notice of the fact that the property was purchased for a homestead, and it is not made to appear that, through fraud or concealment, he was induced to enter into the contract, or part with money, property, or any right. We reach the conclusion that he cannot recover damages against plaintiff upon the contract."[15] The learned judge says that this reasoning does not seem conclusive. If A, without any power whatever to contract for or to make a conveyance of land for B, nevertheless assumes, as the attorney in fact of B, for a good consideration paid to A, to make an agreement for such a conveyance, and fails to perform this agreement, would any court have difficulty in holding that A was liable to the obligee in the contract for the damages sustained by him through a breach of it? His liability rests on a familiar ground,—that of a breach of warranty of agency. Upon this ground persons who assume to make contracts for principals which do not exist, as for supposed corporations which have no legal existence, are constantly held liable personally to make good the damages sustained by the other contracting party. What difference from this case in principle, is the case of a husband who, having a piece of land which is his family homestead, agrees for a consideration paid to him, to make a valid conveyance of the same? Does not such an agreement necessarily involve a representa-

[13] 24 N. W. Repr. 226.
[14] Code of Iowa, § 1990.
[15] These views are supported by Barnett v. Mendenhall, 42 Iowa, 296; Donner v. Redenbaugh, 61 Iowa, 269; s. c., 16 N. W. Rep. 127; and Yost v. Devault, 9 Iowa, 64.

tion or warranty to the other party that the husband will procure the assent of his wife to the conveyance so as to make it valid in law? And when sued for a breach of such an agreement, what answer is it, either in law or in justice, for the husband to say to the party whom he defrauded, "You were bound to take knowledge of a provision of the statute law which made such a conveyance void without the assent of my wife, and as she had not given her assent, I am not liable to make good the damages you have sustained through my breach of my engagement?"

LIABILITY OF PROPERTY OWNERS FOR ITS CONDITION.

The propositions relate to condition rather than management, and to real property rather than personal. The liability of railroads, owners of domestic animals, and, in general, of property in a moving or movable state, suggests for each, separate treatment. The present article will seek to cover such responsibility only as grows out of the use and ownership of real estate.

In general, where the circumstances are such as to create no duty toward strangers the mere fact that injury occurs on one's land imposes no liability upon the owner.[1] The maxim "*sic utere tuo, ut alienum non laedas*, does not apply. Where the management or condition is lawful in itself and negligence toward the rights of strangers may not be predicated thereon, no one can legally complain. A civilized state of society raises many dangers which are common to all conditions. and they cannot therefore be made the grounds of action. Thus the owner of land may build fires thereon,[2] fell trees,[3] dig pits,[4] and place dangerous agencies upon it,[5] and if the injury occasioned thereby be one which he could not by the exercise of reasonable thoughtfulness have foreseen,[6] or if there be no third parties to whom in such conduct he owes some duty of ordinary care,[7] he will not be responsible (with some exceptions, apparent only, to be noted hereafter) for such injury. What such duty is, will always depend upon circumstances.[8] There are, of course, certain relations which cannot be ignored; there are injuries for which he must respond, whether negligent or not,[9] on the ground that where both parties are equally innocent that one who is the cause of injury must suffer the penalty. The duty imposed upon the owner of property requires him to guard against injury to those having

[1] Losee v. Buchanan, 42 How. Pr. 385, reversing 61 Barber, 86; Farrand v. Marshall, 21 Barb. 409: Rockwood v. Wilson, 11 Cush. 221; Brown v. Collins, 53 N. H. 442; Vincent v. Steinhaur, 7 Vt. 62; Alderson v. Naistell, 1 Car. & Kir. 358; Winterbottom v. Wright, 10 Mee. & W. 109; Panton v. Holland, 17 Johns. 92; Thurston v. Hancock, 12 Mass. 220; LaSalle v. Halbrook, 4 Paige, 169; McGuire v. Grant, 25 N. J. L. 356; Beard v. Murphy, 37 Vt. 99, 102; Charles v. Rankin, 22 Mo. 566; Hers v. Luptan, 7 Ohio, 216; Burham v. Musselman, 2 Blackf. 96; Richards v. Sperry, 2 Wis. 216.

[2] Rex. v. Pease, 4 Barn. & Adol. 30. But see Fent v. Toledo, etc., R. Co., 59 Ill. 349; Byron v. Fowler, 70 N. C. 596; Calkins v. Barger, 44 Barber. 424; Bernard v. Poor, 21 Pick. 378; Higgins v. Dewey, 107 Mass. 494; Grannis v. Cummins, 25 Conn. 165; McCully v. Clark, 40 Pa. St. 399; Millar v. Martin, 16 Mo. 508; Fahn. v. Reichart, 8 Wis. 255; Averill v. Murrill, 4 Johns. (N. C.) 323; Sturgis v. Robbins, 62 Me. 289; Fraser v. Tupper, 29 Vt. 409; Gogg v. Vetter, 41 Ind. 228; Hoyt v. Jeffers, 30 Mich. 181; Reade v. Morse, 34 Wis. 315; Hindo v. Barton, 25 N. Y. 545; Ill. etc., R. Co. v. Mills, 42 Ill. 407; Phila. etc., R. Co. v. Yager, 73 Pa. St. 121; Jackson v. Chicago, etc., R. Co. 31 Iowa, 176; Kansas, etc., R. Co. v. Butts, 7 Kan. 308; Burroughs v. Housatonic, etc., R. Co., 15 Conn. 124; McHugh v. Chicago, etc., R. Co. 41 Wis. 78; Woodson v. Milwaukee, etc., R. Co. 21 Minn. 60.

[3] Richards v. Sperry, 2 Wis. 216; Durham v. Musselman, 2 Blackf. 96.

[4] Aurora, etc., R. Co. v. Grimes, 13 Ill. 585. But see Williams v. Grancott, 4 Bert & S. 149; Thurston v. Hancock, 12 Mass. 220; distinction as to soil and building thereon, Gilman v. Driscoll, 122 Mass. 199; as to ancient house, Palmer v. Fleshees, Sid. 167; as to buildings, Quincy v. Jones, 76 Ill. 231; Rule O'Connor v. Pittsburg, 18 Pa. St. 187; Cincinnati v. Penny, 21 Ohio St. 499; Charless v. Rankin, 22 Mo. 566; Partridge v. Scott, 3 Mee. & W. 220; Grayford v. Nichols, 9 Exch. 702; Mariner v. Lussern, 65 Ill. 484.

[5] The Nitro-Glycerine Case, Parret v. Wells, Fargo & Co., 15 Wall. 524; Losee v. Buchanan, 51 N. Y. 476; Cook v. New Floating Dry Dock Co., 1 Hilt., 436.

[6] Hervey v. Nourse, 54 Me. 256; Brown v. Collins, 53 N. H. 442; Morgan v. Cox, 22 Mo. 373; Pearson v. Cox, 26 C. P. Div. 369; Scullon v. Dolan, 4 Daly, 163; Boynton v. Rees, 9 Pick. 528; Tourtellot v. Rosebrook, 11 Metc. 460: Rockwood v. Wilson, 11 Cush. 221.

[7] Cook v. N. Y. Floating Dry Dock Co. *supra*; Gwinnell v. Eames, L. R. 10 C. P. 658; Pretty v. Brickmore, L. R. 8 C. P. 401.

[8] Blythe v. Birmingham Water Works, 11 Exch. 784; Vaughan v. Taff. Vale R. Co. 3 Hurl. & N. 742; Kerwhacker v. Cleveland, etc., R. Co. 3 Ohio St. 172.

[9] Tremaine v. Cohoes Co., 2 N. Y. 163; Fletcher v. Smith, L. R. 7 Exch. 305; Fletcher v. Rylands, 3 Hurl. & Colt. 774; Murphry v. Cousins, 2 C. P. Div. 239; Smith v. Kenrick, 7 C. B. 515; Baird v. Williamson 15 C. B. (N. S.) 376; Dodge v. Co. Coms., 3 Metc. 380; Whitehouse v. Androscoggin, etc., R. Co. 52 Me. 208; Sabin v. Vermont, etc., R. Co. 25 Vt. 363; Gilmore v. Driscoll, 122 Mass. 199.

rights connected with his ownership; if there is no such connection, there is no liability.[10]

Such connection may be special or common. The merchant's customer illustrates the one, the publican on the street illustrates the other. It may be established by contiguity of other property, invitation or long permission to use, public policy, or express statute. Thus one's land may so adjoin another's that operations of blasting,[11] mining,[12] building,[13] making fires,[14] erecting or changing dams,[15] intefering with watercourses,[16] felling trees,[17] grading,[18] etc., may create the necessity of reasonable caution therein. Or the management of property may itself constitute an inducement to others to enter thereon.[19] Or it may adjoin a public street or public grounds.[20] Or a statute may impose a duty otherwise not obligatory,[21] as to fence, or guard ditches, etc.

As said above, the owner of property is liable for injury occurring to those who come upon the same by his invitation.[22] The duty of protection to such is imperative; the owner is bound to see to it that he is not inviting others into danger. Of course the issue will always arise as to contributory negligence, and this will bring up the question of the openness of the defects,[23] whether the place where the injury occurred was a proper place to enter upon under the circumstances,[24] etc. But other things being equal, this is the settled rule. The invitation may be express or implied.[25] The invitation of a proprietor to workmen to enter the premises for purposes of repairs illustrates the first.[26] So also one coming upon a merchant's premises on business directly with the proprietor.[27] Or upon railroad premises provided for passengers.[28] But not if the person injured is a mere idler.[29] Or the invitation may be implied from long

[10] Beach v. Frankenberger, 4 W. Va. 712; Morrill v. Hurley, 120 Mass. 99.

[11] Driscoll v. Newark, etc. R. Co., 37 N. Y. 637; Ulrich v. McCabe, 1 Hilt. 251; Gourdier v. Cormack, 2 E. D. Smith, 200; Devlin v. Gallagher, 6 Daly, 494.

[12] Bagnall v. London, etc. R. Co., 7 Hurl. & N., 423; Acton v. Blundell, 12 Mee. & W., 324; Harner v. Watson, 79 Pa. St. 242; as to buildings on adjacent lands, Rogers v. Taylor, 2 Hurl. & N. 828; but see Micklin v. Williams, 10 Exch. 259; also Backhouse v. Bonomi, 9 H. L. Cas. 503.

[13] Horner v. Nicholson, 56 Mo. 220; Haman v. Stanley, 66 Pa. St. 464; Chicago v. Robbins, 2 Black, 418; Panton v. Holland, 17 Johns. 92; Dorrity v. Rapp, 72 N. Y. 307 (Rev. 11 Hun. 374); Mariner v. Lussern, 65 Ill. 484.

[14] Bachelder v. Heagan, 18 Mo. 32; Dewey v. Learnard, 14 Minn. 153. But injury by fire does not raise presumption of negligence, Bryan v. Fowler, 70 N. C. 596; Lansing v. Stone, 37 Barb. 15; Cleveland v. Thornton, 43 Cal. 437; Higgins v. Dewey, 107 Mass. 494; Collins v. Graseclose, 70 Ind, 414; Kripner v. Biele, 9 N. W. Rep. 671 (Minn.)

[15] Pallet v. Long, 56 N. Y. 200; Hoffman v. Tuolame Water Co., 10 Cal. 413; Frye v. Moore, 53 Me. 583; Gray v. Harris, 107 Mass. 492. See St. Anthony Falls Co. v. Eastmann, 20 Minn. 277.

[16] Bellinger v. N. Y. Cent. R. Co., 23 N. Y. 47; Gray v. Harris, *supra*.

[17] Richards v. Willard, 2 Wis. 216.

[18] Smith v. Milwaukee, 18 Wis. 64; Hundhausen v. Bond, 36 Wis. 29. As to excavations, see Farrand v. Marshall, 19 Barb. 380; LaSalle v. Holbrook, 4 Paige 169; Gilmoore v. Driscoll, 122 Mass. 199.

[19] Indermaur v. Dawes, L. R. 1 C. P. 274; Carleton v. Franconia Iron Co., 99 Mass. 216; Francis v. Cockrell, L. R. 5 Q. B. 184; Tobin v. Portland, etc. R. Co., 59 Me. 183; Frankfort Bridge Co. v. Williams, 9 Dana, 403.

[20] Myers v. Malcomb, 6 Hill. 292; Lansing v. Smith, 4 Wend, 9; Lindley v. Bushnell, 15 Conn. 225; Farnum v. Concord, 2 N. H. 392; Torry v. Ashton, 1 Q. B. Div. 314; Hunt v. Hoyt, 20 Ill. 544; Mullen v. St. John, 57 N. Y. 567; Yager v. Adams, 123 Mass. 26. See *contra*, Howland v. Vincent, 10 Metc. 371.

[21] *Cattle*, Gorman v. Pacific R. Co., 26 Mo. 442; Kerwhacker v. Cleveland. etc. R. Co., 3 Ohio St. 172; *Fire*, De Franco v. Spencer, 2 Greene (Iowa) 462. In North Carolina, Missouri and Illinois, statutes impose liability for certain uses of fire. In Vermont, Maryland, New Jersey, Kansas and Iowa, setting out fire by railroads is *prima facie* evidence of negligence. In Wisconsin it is a question for the jury.

[22] Gilbert v. Nagle, 118 Mass. 278; Pasterre v. Adams, 49 Cal. 87; Totten v. Phipps, 52 N. Y. 354; Brown v. Kennebec Agr. Soc., 47 Me. 275; Latham v. Roach, 72 Ill. 179; Coughtry v. Globe Woolen Co., 56 N. Y. 124 Rev. 1 N. Y. S. C. C. (T. & C.) 452; McDonald v. Chicago etc. R. Co., 26 Iowa, 124, 145; Swords v. Edgar, 59 N Y. 28; Wendell v. Baxter, 12 Gray, 494; Campbell v. Portland Sugar Co., 62 Me. 552; Railroad Co. v. Hanning, 15 Wall. 649; McGwinness v. N. Y., 52 How. Pr. 450; Elliot v. Pray, 10 Allen, 378.

[23] Gorman v. Bangor, 38 Me. 443; Folsam v. Underhill, 36 Vt. 580; Kelly v. Fond du Lac, 31 Wis. 179; Craig v. Sedalia, 63 Mo. 417; Durkin v. Troy, 61 Barb. 437; Schaefler v. Sandusky, 33 Ohio St. 246. But knowledge by plaintiff of a defect is not necessarily a defense, Thomas v. Western Union Tel. Co., 100 Mass. 156; Fox v. Glastenbury, 27 Conn. 204; Evans v. Utica, 69 N. Y. 166.

[24] Zœbisch v. Tarbell, 10 Allen, 385; Murray v. McLean, 57 Ill. 378; McKee v. Bidwell, 74 Pa. St. 218; Victory v. Baker, 67 N. Y. 366; Pierce v. Whitcomb, 48 Vt. 127; Bacon v. City of Boston, 3 Cush. 174.

[25] Carleton v. Franconia Iron Co., 99 Mass. 216, Sweeny v. Old Colony, etc. R. Co., 10 Allen, 368.

[26] Indermaur v. Dawes, L. R. 1 C. P. 274.

[27] Indermaur v. Dawes, *supra*, Chapman v. Rathwell, El. Bl. & El. 68.

[28] McDonald v. Chicago, etc. R. Co., 26 Iowa, 124; Toledo, etc. R. Co. v. Grush, 67 Ill. 262; Holmer v. Northeastern R. Co., L. R. 4 Exch. 254; Pittsburgh, etc. R. Co. v. Brigham, 29 Ohio St. 374; Indiana, etc. R. Co. v. Hudleson, 13 Ind. 325; Patten v. Chicago, etc. R. Co., 32 Wis. 524; Beard v. Conn. etc. R. Co., 48 Vt. 101 Knight v. Portland, etc. R. Co., 56 Me. 234; Hulbert v. N. Y. etc. R. Co., 40 N. Y. 145.

[29] Hargreaves v. Deacon, 25 Mich. 1.

user to the owner's knowledge.[30] But this rule is subject to qualifications. If at the time of the injury the premises are in the same condition they have been in for years, during which time the public have used them without change by the owner, rendering them dangerous, it has been decided the owner is not liable, on the ground that the invitation carries with it all the surrounding circumstances, and is based on the premises as they exist.[31] If, however, the particular spot where the injury occurred be one which the injured party had no right or cause to enter upon,[32] or which the owner had no reason to expect would be entered upon,[33] the latter cannot be held. Or, of course, if the accident was unaccountable.[34] In all such cases negligence on the part of the owner cannot be predicated as the proximate cause. Nor will a general invitation to the public for business purposes include persons entering for other purposes so as to render the owner liable.[35] He owes no duty in such cases to mere visitors.[36] Nor to mere licensees.[37] What will constitute a mere license is not distinctly settled. Probably anything stronger than a mere passive standing by would be construed as such permission as raises a duty and hence responsibility,[38] or an implied license amounting to inducement.

Yet the ground is not entirely covered by the doctrine of license (as used by some courts making it the basis of liability),[39] or invitation or inducement. There is a class of cases in which proprietors are held for injury to trespassers. Trespass will be no defense if the injury is caused by malicious negligence,[40] or consists in circumstances amounting to wanton disregard for life or property.[41] In this class are the spring-gun,[42] spike,[43] pitfall,[44] etc., cases, frequent in early English reports. If, however, the person injured is purely a trespasser, having no occasion to enter the premises, and such disregard for life or property has not been manifested by the owner, the injury must be attributed to the trespasser himself.[45] But where the trespass is merely technical it is not always a defense, as where the defect is in juxtaposition to a public street,[46] or a public ground or private way[47] on which the public is invited or allowed by the owner, and the trespass consists only in a slight deviation[48] into the premises. One having a dangerous place or agent near such public resorts must reasonably anticipate injury from defects.[49] And in general it may be said that where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its

[30] Clark v. Chambers, 3 Q. B. Div. 339; Illinois, etc. R. Co. v. Hammer, 72 Ill. 347; Hartz v. Central, etc. R. Co., 42 N. Y. 468; Brown v. Hannibal, etc. R. Co., 50 Mo. 461; Penn. R. Co. v. Lewis, 79 Pa. St. 33; Daly v. Norwich, etc. R. Co., 26 Conn. 591; Oliver v. Worcester, 102 Mass. 489.

[31] Cohill v. Layton, 57 Wis. 600.

[32] Phila. & Read. R. Co. 44 Pa. St. 375; Harlan v. St. Louis, etc. R. Co., 64 Mo. 480. See Totton v. Phipps, 52 N. Y. 354.

[33] Victory v. Baker, 67 N. Y. 366; Aurora, etc., R. Co. v. Grimes, 13 Ill. 585.

[34] Steffen v. C. & N. W. R. R., 46 Wis. 259; Chappel v. Oregon, 36 Wis. 145; Lorenson v. Menasha P. & P. Co., 56 Wis. 338.

[35] Hargreaves v. Deacon, 25 Mich. 1; Stone v. Jackson, 16 C. B. 199; Frost v. Grand Trunk R. Co., 10 Allen 387; Haunsell v. Smith, 7 C. B. (N. S.) 731; Balch v. Smith, 7 Hurl. & N. 736: Kohn v. Lovett, 44 Ga. 251.

[36] Southcote v. Stanley, 1 Hurl. &. N. 247; 25 L. J. (Exch.) 339.

[37] Illinois, etc., R. Co. v. Hetherington, 83 Ill. 510: Jeffersonville, etc., R. Co. v. Goldsmith, 47 Ind. 43; Bancroft v. Boston, etc., R. Co., 97 Mass 276; Sullivan v. Waters, 14 Jr. C. L. R. (N. S.) 464; Binks v. South Yorkshire R. Co., 3 Best & L. 244; Morgan v. Penins R. Co., 7 Fed. Rep. 78; Vanderbeck v. Henry, 34 N. J. Law 467.

[38] Theayer v. Jarvis, 44 Wis. 388.

[39] Theayer v. Jarvis, *supra*.

[40] Jay v. Whitfield, cited in Barn. & Ald. 308 and 4 Bing 644; Townsend v. Nathan, 9 East. 277; Hooker v. Miller, 37 Iowa 613; Hydraulic Co. v. Orr, 83 Pa. St. 332; Hicks v. Pacific R. Co., 64 Mo. 430.

[41] Carroll v. Minn. etc. R. Co., 13 Minn. 30; Green v. Erie, etc., R. Co., 11 Hun. 333.

[42] Hooker v. Miller, 37 Iowa 613; Bird v. Holbrook, 4 Bing. 628.

[43] Jordin v. Crump, 8 Mee. & W. 782.

[44] Young v. Harvey, 16 Ind. 314; Williams v. Grancott, 4 Best & S. 149; Sybray v. White, 1 Mee. & W. 435.

[45] Hargreaves v. Deacon, *supra;* Raulston v. Clark, 3 E. D. Smith, 366; Kohn v. Lovett, 44 Ga. 251; Baker v. Byrne, 58 Barb. 438; Severy v. Nickerson, 120 Mass. 306. But a trespasser must not be guilty of negligence, Elwood v. N. Y., etc. R. Co., 4 Hun, 808; Gonzales v. N. Y., etc. R. Co., 50 How. Pr. 126.

[46] Barnes v. Ward, 9 C. B. 392; Gramlich v. Wurst, 86 Pa. St. 74; Hayden v. Attleborough, 7 Gray, 338; Lyman v. Amherst, 107 Mass. 339; Willey v. Portsmouth, 35 N. H. 303; Prideaux v. Mineral Point, 43 Wis. 513.

[47] Donovan v. Board of Education, 55 How. Pr. 176; Corley v. Hill, 4 C. B. (N. S.) 556; Clark v. Chambers, 3 Q. B. Div. 327.

[48] Coupland v. Hardingham, 3 Camp. 398; Birge v. Gardiner, 19 Conn. 507; Hydraulic Works Co. v. Orr, 83 Pa. St. 332.

[49] Grover v. Shattuck, 35 N. H. 265; Hydraulic Works Co. v. Orr, *supra*.

openness to the public, liability will attach if he has been guily of negligence.[50]

If the injured person is a child of tender years, the rule of care is drawn with greater strictness.[51] The weight of authority sustains the proposition that the fact that a child is a trespasser will be no defense where danger to children may be reasonably apprehended. Where circumstances are wanting which should create such apprehension, the owner of property cannot be held for mere accidents.[52] But if one leaves his premises in such condition that injury may probably occur to straying children, the fact that they are technical wrong-doers is no defense,[53] even if the injury is caused by their meddling.[54] But where the owner has exercised that degree of care incumbent on him under the circumstances, he cannot be made an insurer of children's lives.[55] So where the defect is in isolated property and open to plain sight, even if the public are allowed near it,[56] unless, probably, the owner has done some recent act creating danger where none before existed.[57] Children are held to that degree of care only which others of their age and discretion usually exercise.[58] If injured while following their natural instincts, he whose negligence has caused the injury must, respond.[59] There must be negligence under the circumstances. For mere accidents without negligence on the part of the owner, he cannot be made liable.[60] So, of course, where the parents have been guilty of negligence in their care of the child, in those jurisdictions where the doctrine of imputed negligence prevails.[61] There is a class of cases in which liability is held where dangerous machinery is left exposed to the probable meddling of straying children.[62] Yet if the child has been negligent under the circumstances of its age and discretion, this will defeat a recovery.[63] At what age a child is *sui juris* is variously decided.[64] If the child has committed no act which would be negligence on the part of an adult, it has been held negligence of the parent will not defeat an action.[65] There would seem to be nothing in the difference between dangerous machinery inviting children to meddle therewith, and excavations, concealed or otherwise, if the owner has been negligent and danger was likely to be apprehended, although some of

[50] Hydraulic Works Co. v. Orr, *supra*.

[51] Robinson v. Cone, 22 Vt. 213; Philadelphia, etc. R. Co. v. Spearen, 47 Pa. St. 300; Isabel v. Hannibal, etc. R. Co., 60 Mo. 475; Barley v. Chicago, etc. R. Co., 4 Biss. 430.

[52] Lynch v. Nurdin, 1 Q. B. 29; Bird v. Holbrook, 7 Taunt. 489; Kerr v. Fargue, 54 Ill. 482; Birge v. Gardiner, 19 Conn. 507; Boland v. Missouri, etc. R. Co., 36 Mo. 484; Railroad Co. v. Stout, 17 Wall. 657; Keefe v. Milwaukee, etc. R. Co., 21 Minn. 207; Whirley v. Whitman, 1 Head. 610: Mullany v. Spence, 15 Abb. Pr. (N. S.) 319.

[53] Mangan v. Atterton, L. R. 1 Exch. 239; Singleton v. Eastern Co's R. Co., 7 C. B. (N. S.) 289; McAlpin v. Powell, 55 How. Pr. 163; Wood v. Ind. School Dist., 44 Iowa, 27.

[54] Bronson v. Labrot, Ct. App. Ky., Chi. Legal News, May 10, 1884.

[55] Birge v. Gardiner, 19 Conn. 507; Keefe v. Milwaukee, etc. R. Co., 21 Minn. 207.

[56] Hargreaves v. Deacon, 25 Mich. 1.

[57] Gillespie v. McGowan, 100 Pa. St. 144; St. Louis, etc. R. Co. v. Bell, 81 Ill. 76.

[58] Railroad Co. v. Stout, 17 Wall. 657; Baltimore, etc. R. Co. v. Fryer, 30 Md. 47; East Sag. R. Co. v. Bohn, 27 Mich. 503; Birge v. Gardiner, 19 Conn. 507; Smith v. O'Connor, 48 Pa. St. 218; Mowry v. Cent. Park R. Co., 51 N. Y. 667: Brown v. European, etc., R. Co., 58 Me. 384; Lynch v. Smith, 104 Mass. 53; Chicago, etc. R. Co. v. Baker, 76 Ill. 25; Boland v. Missouri R. Co., 36 Mo. 484; Ewen v. Chicago, etc. R. Co., 38 Wis. 613.

[59] Keefe v. Milwaukee, etc. R. Co., 21 Minn. 207; Koons v. St. Louis. etc. R. Co., 65 Mo. 592.

[60] Hartfield v. Roper, 21 Wend 615; Bulger v. Albany R. Co., 42 N. Y. 459; Hubener v. New Orleans, etc. R. Co., 23 La. An. 492; Chicago, etc. R. Co. v. Stumps, 69 Ill. 409; Meeks v. Southern Pac. R. Co., 52 Cal. 602; McAlpin v. Powel, 55 How. Pr. 163.

[61] Where the action is by the parent as administrator, Albertson v. Keokuk, etc. R. Co., 48 Iowa, 292; Philadelphia, etc. R. Co. v. Long, 75 Pa. St. 257; Daly v. Norwich, etc. R. Co., 26 Conn. 591.

[62] Hydraulic Works Co. v. Orr, 83 Pa. St. 332; Birge v. Gardiner, 19 Conn. 507; Railroad Co. v. Stout, 17 Wall. 657; Keefe v. Milwaukee, etc. R. Co., 21 Minn. 207; Whirley v. Whitman, 1 Head. 610; Mullaney v. Spence, 15 Abb. Pr. 319. But see Hughes v. Macfie, 2 Hurl. & Colt, 744; Mangan v. Atterton, L. R. 1 Exch. 239.

[63] See Thompson on Negligence, vol. 1, p. 305, *et seq.* But that a child of tender years cannot be guilty of negligence, see Schmidt v. Milwaukee, etc. R. Co., 23 Wis. 186.

[64] Three years and seven months, not *sui juris*: Mangan v. Brooklyn R. Co., 38 N. Y. 455; two years: Hartfield v. Roper, 21 Wend. 615; one year five months: Kreig v. Wells, 1 E. D. Smith, 76; two years and four months: Callahan v. Bean, 9 Allen, 401; five years: Jeffersonville, etc. R. Co. v. Bowen, 40 Ind. 545; six years: Chicago v. Storrs, 42 Ill. 174; seven years: Pittsburgh, etc. R. Co. v. Vining, 27 Ind. 513; submitted to the jury, over six: Hanegsberger v. Second Ave. R. Co., 1 Keyes, 570; ten years: Lovett v. Salem, etc. R. Co., 9 Allen, 557; eight years: Drew v. Sixth Ave. R. Co., 26 N. Y. 49; a little over three years: Mulligan v. Curtis, 100 Mass. 512.

[65] McGarry v. Loomis, 63 N. Y. 104; O'Brien v. McGlinchy, 68 Me. 552; Ihl v. Forty-second Street R. Co., 47 N. Y. 317; Pittsburgh, etc. R. Co. v. Burnstead, 48 Ill. 221; Lanner v. Albany Gas Co., 46 Barb. 264.

the courts lay stress upon the temptation incident to exposed machinery to children to play with and around it.

The party liable in general is he who has possession and control of the property.[66] It will be seen that these two conditions must usually obtain, as one may be in possession and not have control, and possession may itself imply certain special management. For, as between landlord and tenant, the latter is usually responsible for the condition of the premises, and he alone.[67] But where injury occurs from a defect which existed prior to the demise, the owner or lessor is chargeable therefor,[68] in the absence of agreements. And both may be liable,[69] as if the defect be one which the law would require both to repair. The control of the premises need not be general.[70] It is sufficient if it extend to the defective portion.[71] If the defect or injury arise from the tenant's use of the premises, the latter is the responsible party.[72] But if the using as contemplated by the lease must create a nuisance, the owner will be liable.[73] Where premises are passed in a defective condition it seems it must be shown the owner derives some profit from them,[74] or that there are covenants for continuance of the defective condition.[75] If the owner covenants in the lease to make repairs, and injury occur through non-repair, he is liable.[76] In the absence of agreements therefor, the duty, and hence the responsibility, is upon the tenant.[77] Where the landlord goes upon the premises for the purpose of repairing them, if injury result from the negligent manner of conducting the same, the landlord is held responsible.[78] And this is so where the undertaking is without covenant and gratuitous, under the familiar rule that he who enters upon an undertaking must perform the duty thereof in a proper manner.[79] Of course as to parties the familiar rules of privity obtain. If the landlord would be under no duty if in occupation, he cannot be while acting as landlord. The rules concerning trespassers, children, the probability of injury, etc., apply here. The owner owes no duty toward a mere visitor of the tenant,[80] nor toward adult trespassers under the exceptions.[81] If, however, he causes a defect by which injury occurs to others rightfully upon the premises as contemplated in the leasing, liability attaches.[82] Or if near or on a public street.[83] Or where the defect is open to straying children whose presence ought to be foreseen or apprehended.[84] In some cases it seems the landlord must have knowledge of the defect,[85] or the duty of ascertaining must be shown.[86] There may be a duty, under peculiar circumstances, which the courts will not allow the owner to shift, as to keep the roof of a rented building clear of snow.[87] But this is questioned.[88] As between landlord and tenant the above rules apply where applicable.[89] As

[66] Nelson v. Liverpool Brewery Co., 2 C. P. Div. 311; O'Brien v. Copwell, 49 Barb. 497; Chauntler v. Robinson, 4 Exch. 163; Kaster v. Newhouse, 4 E. D. Smith, 20; Gridley v. Bloomington, 68 Ill. 47; Blunt v. Aiken, 15 Wend. 522; Fiske v. Framingham Man. Co., 14 Pick. 491; Readman v. Conway, 126 Mass. 374.

[67] Bears v. Ambler, 9 Pa. St. 193; Shipley v. Fifty Ass., 101 Mass. 251.

[68] Rosewell v. Prior, 2 Salk. 459; Waggoner v. Jermaine, 3 Denio, 306; Irvine v. Wood, 51 N. Y. 228; Stephani v. Brown, 40 Ill. 428; Moody v. New York, 43 Barb. 282; Durant v. Palmer, 29 N. J. L. 544; Horese v. Metcalf, 27 Conn. 632; Burdick v. Cheadle, 26 Ohio St. 397; Godey v. Hogerty, 20 Pa. St. 387. But see Mellen v. Morrill, 126 Mass. 545.

[69] Whalen v. Gloucester, 6 N. Y.; S. C. (T. & C.), 135. See note 63.

[70] Scott v. Bay, 3 Md. 431; Stewart v. Harvard College, 12 Allen, 58; Shipley v. Fifty Ass., 106 Mass. 194.

[71] Stewart v. Harvard College, *supra*.

[72] Rich v. Basterfield, 4 C. B. 783; see Fish v. Dodge, 4 Denio, 311; Hale v. Dutant, 39 Texas, 667; Rickard v. Collins, 23 Barb. 444; Muller v. Stone, 27 La. An. 123.

[73] Rex v. Pedly, 1 Ad. & E. 822.

[74] Albany v. Cunliff, 2 N. Y. 174; Honse v. Cowing, 1 Lans. 288.

[75] Waggoner v. Jermaine, 3 Denio, 306.

[76] Payne v. Rogers, 2 H. B. 350; Lowell v. Spaulding, 4 Cush. 278; Kirby v. Boylston Market Ass., 14 Gray, 249.

[77] Blunt v. Aikin, 15 Wend. 522; Stewart v. Prelnam, 127 Mass. 403.

[78] Leslie v. Pound, 4 Taunt. 649; Lowell v. Spaulding, *supra*.

[79] Gill v. Middleton, 105 Mass. 479. See Bender v. Manning, 2 N. H. 289; Thorne v. Deas, 4 Johns. 84; Shiells v. Blackburne, 1 H. Bl. 158; Balfe v. West, 22 Eng. Law & Eq. 506.

[80] Southcote v. Stanley, 1 Hurl. & N. 247.

[81] Raulston v. Clark, 3 E. D. Smith, 366.

[82] See note 72, 73, 63 and 65.

[83] Irvine v. Wood, 51 N. Y. 224.

[84] See note 49.

[85] See Larry v. Ashton, 1 Q. B. Div. 814.

[86] See Gray v. Boston Gas Light Co., 114 Mass. 149.

[87] Shipley v. Fifty Ass., 101 Mass. 251; Walsh v. Mead, 8 Hun, 389; Garland v. Towne, 55 N. H. 55.

[88] Leonard v. Storer, 115 Mass. 86.

[89] The general rule is *caveat emptor*. But see Totten v. Phipps, 52 N. Y. 354; Elliot v. Pray, 10 Allen, 378; infected premises leased: Minor v. Sharon, 112 Mass. 477. See Kimmel v. Breefeind, 2 Daly, 155; Alston v. Grant, 3 El. & Bl. 128.

before indicated, there are some duties which the owner of property cannot shift. He will be liable for injuries occurring through the negligence of independent contractors,[90] or their servants, where he has been negligent in selecting the former,[91] or where the work to be done is unlawful in itself,[92] or where it is necessarily dangerous,[93] or the particular part thereof causing injury is a necessary part of the contract.[94] The law of the road, and duties of municipalities under this subject need not be here discussed. But property owned by municipalities which is a source of emolument to them, carries the same duties and liabilities in this connection as private.[95]

FRANK C. HADDOCK.

Oshkosh, Wis.

[90] See 19 Cent. L. J. 105; 18 Am. Law Rev., No. 3.
[91] See Kelly v. New York, 4 E. D. Smith, 291. But see same, 11 N. Y. 432.
[92] Ellis v. Sheffield Gas Can Co., 2 El. & Bl. 766; Cuff v. Newark, etc. R. Co., 35 N. J. L. 17, 574; Kellogg v. Payne, 21 Iowa, 578; Hundhausen v. Bond, 36 Wis. 29.
[93] Bower v. Peate, 1 Q. B. Div. 321; Pickard v. Smith, 10 C. B. (N. S.) 470; Gorham v. Gross, 125 Mass. 232.
[94] Chicago v. Robbins, 2 Black, 418.
[95] Oliver v. Worcester, 102 Mass. 489.

CORPORATION—ULTRA VIRES.

DAY v. SPIRAL SPRING BUGGY CO.*

Supreme Court of Michigan, June 3, 1885.

CORPORATION. [*Ultra Vires—Estoppel*]—*Action to Recover Value of Goods Under Ultra Vires Contract Partly Performed—Corporation Estopped to set up Invalidity or to Recoup Damages.*—Plaintiff contracted to sell to defendant corporation 174 tons of "excelsior," not to be used by defendant in its business, but to be resold by it on speculation, as plaintiff well knew. After delivering a considerable quantity plaintiff refused to deliver more, and defendant refused to pay for what had been delivered unless the whole amount was delivered as agreed, whereupon plaintiff sued for the value of the excelsior delivered, and defendant set up as a counter-claim damages resulting from a failure by plaintiff to fully perform the contract. *Held*, that plaintiff was entitled to recover for the excelsior actually delivered, although the contract was *ultra vires*, and that defendant was not entitled to recoup the damages arising from the breach thereof.

Case made from Kent.

Edward Taggart, for plaintiff; *Maher & Falker*, for defendant and appellant.

COOLEY, C. J., delivered the opinion of the court:

*S. C., 23 N. W. Repr. 628.

This action is brought to recover the value of thirty-two tons of the article called "Excelsior," which had been received by the defendant of the plaintiff. The defendant is a corporation, organized, as its articles of association state, "to purchase material for, and manufacture and sell, carriages, and carriage and harness hardware; also for the disposing of the right to manufacture on royalty the spiral buggy-spring, Smith's patent." In the manufacture of carriages excelsior is used for upholstering seats and backs, but for no other purpose. The place of business of defendant is Grand Rapids, Michigan.

It was shown on the trial that in April, 1883, defendant contracted with one Hulz, of Chicago, to sell and deliver to him in Chicago 174 tons of excelsior, the delivery to be made at the rate of two car-loads a month, and the price to be $14 a ton. For the purpose of this contract defendant then bargained with the plaintiff that she should manufacture the requisite quantity of excelsior and deliver it on board cars or boat at Grand Rapids, billed to Hulz at Chicago. The price to be paid by defendant was $11.50 a ton, which, after paying cost of transportation, would leave to the defendant a profit on the sale to Hulz. It was known to plaintiff, when she contracted for the manufacture, that the defendant was not procuring the article for use in its business, but for the purposes of a sale at a profit in Chicago, where the defendant had no place of business, and the delivery to be made by her was to be made from time to time, as required by the Hulz contract. The plaintiff was therefore fully aware that the contract of the defendant with her was purely one of speculation, and had no connection with its legitimate corporate business.

The excelsior was delivered by the plaintiff under the contract from time to time until about June 15, 1883, and was shipped to Chicago under defendant's contract with Hulz. At the time last mentioned the market value of the article had considerably advanced, and plaintiff declined to deliver any more at the price agreed upon. Part payment had been made for the quantity received, and defendant refused to pay further unless plaintiff should go on in completion of her contract. This suit was accordingly instituted.

The claim of the plaintiff is that the contract she entered into with the defendant was void in law; that therefore she was at no time under obligation to perform it; that, in so far as the defendant has received excelsior from her, she is entitled to recover the value, not exceeding the price agreed upon; and having shown that the value was equal to that price, she now claims to recover it in this suit. The defendant, on the other hand, insists that the plaintiff is estopped by the contract from disputing the capacity of the defendant to enter into it; and that when she refuses to perform, she becomes liable in damages. These damages the defendant seeks to recover from the claim of the plaintiff. The circuit judge was of opinion

that the contract made by the defendant with Hulz, not being for a corporate purpose, was *ultra vires* and void, and the contract made with the plaintiff for the purpose of meeting its requirements was void also. For the excelsior actually received by the defendant the plaintiff was held entitled to recover, as if the void contract had not been entered into; but a claim to recoupment must necessarily assume the validity of the contract, and was therefore inadmissible. The judge, therefore, gave judgment for the plaintiff for the value of what had been received, deducting such payments as had been made. The defendant brings error.

It is scarcely denied in this court that the contract of the defendant on which it now relies was *ultra vires*. Its corporate purposes were specified in its articles, and it was without legal power to go beyond them. The contract was one of speculative dealing, and was as much foreign to the purposes of corporate organization as would have been a contract for dealing in grain on the produce exchange, or in shares in the stock market. The State had not by law consented that its manufacturing corporations should be at liberty to make such contracts, but for reasons of sound public policy had withheld from them the power to do so. Neither had the corporators of the defendant consented that their interests might be put in jeopardy by such dealings. But defendant relies here, as it did in the court below, upon the plaintiff's being estopped by her contract from raising the question of *ultra vires*. She has certainly admitted the power of the defendant to make the contract, and if the elements of an estoppel are to be found in this mere admission, or in this admission coupled with such action as has taken place under it, then the defendant should be entitled to recoupment.

There are some decisions which give plausibility to the position of the defendant, but we know of none that is adequate to the exigences of this case. Parties entering into contracts with an association of persons, who are *de facto* exercising corporate powers, are not suffered to dispute the corporate authority which their contracts admit (Swartwout v. Michigan Air-line R. Co., 24 Mich. 389; Wilcox v. Toledo, etc., R. Co., 43 Mich. 584; s. c., 5 N. W. Rep. 1003); but this is on the principle that a usurpation of corporate authority concerns only the State, and it is supposed the State will move on its own behalf to have the usurpation punished or restrained when it is found to exist, if the occasion seems to call for it. The case before us is not one of that description. The defendant's possession of corporate powers is conceded, and though the particular act was done without authority, the State was not the only party interested in questioning it. Every stockholder was entitled in his own interest to insist on its being repudiated, for he had not consented to put his share of the capital at the risk of any such venture. There are some cases, also, in which parties by false representations have induced others to act upon invalid contracts as if they were valid, and to make payments, deliver property, or otherwise change their positions in reliance upon the contracts, under such circumstances that nothing but the enforcement of the contracts will do complete justice, and in such cases the doctrine of estoppel may well be applied. But this is not such a case. No false representations are alleged, and it is not disputed that all parties were fully aware of all the facts. They must therefore be supposed to have understood that the contract in its inception was *ultra vires*. And the power on the part of such a corporation to enter into contracts of speculation being withheld, on reasons of public policy, for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the State for general reasons has withheld from it. Pennsylvania, etc., Nav. Co. v. Dandridge, 8 Gill & J. 248, 319.

Parties may also be estopped, in some cases, from disputing the validity of a corporate contract when it has been fully performed on one side, and when nothing short of enforcement will do justice. To quote the language of Comstock, C. J., in Parish v. Wheeler, 22 N. Y. 494, 508: "The executed dealings of corporations must be allowed to stand for and against both parties, when the plainest rules of good faith so require." But this is not such a case. The contract has only been performed in part. The defendant has received a portion of the property bargained for, and we may justly assume that what has been received has passed into the hands of Hulz and been paid for, so that the defendant will lose nothing but the anticipated profits on the remainder if the contract is not enforced in its favor. Those profits it had no right at any time to count upon; and, in contemplation of law, there can be no injustice in depriving it of profits which the law would not permit it to bargain for. No valid ground for estoppel is therefore found to exist in the case.

The defendant, then, if the plaintiff has established a valid demand, is not entitled to recoup damages for refusal to make complete performance, because to allow recoupment would be indirectly to enforce the contract. Whether the plaintiff is entitled to recover for the goods delivered and not paid for is the remaining question. The defendant has had the goods, and there is no want of equity in requiring it to make payment. They were delivered under a contract which bound neither party, and though the plaintiff is the party who now refuses to go on with it, the defendant was at liberty to do the same, and we cannot know that it would not have done so if the change in market value had been such as to make it for its interest. But, however that may be, if the de-

fendant pays for the property received, the parties will have justice meted out to them as nearly as is now possible.

It is to be observed that the contract, though void in law, involved no element of criminality, and nothing of an immoral nature. The case is not, therefore, one in which the law will leave the parties without redress for the consequences of criminal or immoral action. The plaintiff had a right to sell her manufacture, and to be paid for it; the defendant has received something of value from her, and there is manifest equity in its being required to make payment, notwithstanding it exceeded its powers in the purchase.

The cases of Pratt v. Short, 79 N. Y. 437; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655; Harriman v. Baptist Church, 63 Ga. 186, are in point, and fully sustain the judgment. The principle involved is considered at length in Whitney Ams. Co. v. Barlow, 63 N. Y. 62, and is supported by Thomas v. Railroad Co., 101 U. S. 71; *In re* Cork & Y. Ry. Co., L. R. 4 Ch. App. 748; *In re* National, etc., Society, L. R. 5 Ch. App. 309; and many other cases. No doubt it results in a degree of hardship in some cases, when a party fails to obtain all that has been bargained for; but the loss of anticipated advantages, as an incident to unauthorized dealings, is one for which the parties themselves are responsible, not the law.

The judgment must be affirmed.

(The other justices concurred.)

Illegal Ultra Vires Contracts.—In adjudicating upon the rights of persons arising out of *ultra vires* contracts the first inquiry should be: Is not the contract illegal? Besides being beyond the charter powers of the company, the contract may be immoral; it may be forbidden by some statute; or it may be prohibited by some principle of public policy. And if, besides being *ultra vires*, the contract be for any of these reasons illegal, the law will not enforce it, nor in any way undertake to adjust the equities between the parties to it. It will leave them where by their own wrongful acts they have placed themselves. "It is no doubt the general rule of law," says Andrews, J., in Pratt v. Short,[1] "that no right of action can spring out of an illegal contract, and the rule that an illegal contract cannot be enforced, applies as well to contracts *malum prohibitum*, as to contracts *malum in se*. But it does not necessarily follow that all the consequences attending a contract, which is contrary to public morals, or founded on an immoral consideration, attend and affect a contract *malum prohibitum* merely. The law in the former case will not undertake to relieve parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and if justice and equity require a restoration of money or property, received by either party thereunder, it will, and in many cases, has, given relief. So also a prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the legislature intended to define such consequences, and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be entertained." To this rule there is at least one exception: While a court will not undertake to adjust the equities arising out of partial or entire performance of an *ultra vires* contract, for the benefit of the parties to such contract, yet where public interests require such adjustment, it will be made. The litigation between the American Union Telegraph Company and the Union Pacific Railroad Company is believed to illustrate this point. That litigation arose out of the lease by the Union Pacific Railroad Company of certain telegraph lines and property necessary to the performance of its obligations and duties to the government and to the public. An accounting and settlement, including mutual restitution, was decreed as between the companies.[2] And in any case a court will examine a contract to determine whether or not it is illegal or *ultra vires* even though it may decide to leave the parties in the situation in which they have placed themselves. This is illustrated by a New York case in which a lease made by a railway company to extend its road beyond the terminus fixed by its charter was held *ultra vires* and void as against public policy, although the court, refusing to relieve the parties further than public interest required, declined to allow any recovery for the use of the property, previous to the declaration of the invalidity of the lease.[3]

Ultra Vires Contracts not Illegal.—Many cases illustrate the adjustment of equities between the parties to *ultra vires* contracts that are not illegal. The general rule governing such transactions is thus stated by Mr. Brice: "But though a corporation cannot be sued, any more than any other citizen, directly upon a contract or analogous transaction which does not bind it, yet if it sets up this defense it must restore to the other party what it has obtained from him. It may repudiate the transaction if it chooses, but if so it must repudiate altogether—it cannot reprobate and approbate. It cannot reject and yet keep what in another form it has rejected."[4] This statement Mr. Taylor qualifies thus: "That the corporation may repudiate the contract without rendering up the benefits which through the contract have accrued to the corporate property when such benefits have become amalgamated with the corporate property, and cannot be rendered up without infringing the rights of persons who have never assented to the contract, nor in any way acquiesced in it,"[5]—a qualification which, understood with reference to third persons who, in good faith and without notice, have acquired rights in property acquired by a corporation under an *ultra vires* contract seems proper enough.

As has been said, recovery of benefits conferred by *ultra vires* contract or an equivalent therefor has been sanctioned in many cases. Thus $1,000 paid for wheat to a common carrier having no authority to buy wheat has been recovered.[6] Money loaned *ultra vires* is recoverable.[7] A Georgia case sanctions the recovery of money paid by a church for the use of a steamboat, it having no authority to charter such a boat.[8] In another case The

79 N. Y. 445.

2 See Am. U. Tel. Co. v. U. P. R. Co., 1 McCrary, 188; A. & P. Tel. Co. v. U. P. R. Co., 1 McCrary, 541; Cent. Br. U. P. R. Co. v. W. U. T. Co., 1 McCrary, 551; W. U. T. Co. v. Buel. etc. R. Co., 3 McCrary, 130.

3 President Un. Rr. Co. v. Troy & L. R. Co., 7 Lans. 241.

4 Brice's *Ultra Vires*, p. 769.

5 Taylor Corp. § 310.

6 Northwestern Packet Co. v. Shaw, 37 Wis. 657.

7 Pratt v. Short, 79 N. Y. 437.

8 Harriman v. First Bryan Baptist Church, 63 Ga. 197.

Oil Creek & A. R. R. Co., agreed to pay the Pennsylvania Transportation Company, an oil pipe line, a certain sum per barrel on all oil transported by it, in consideration that the pipe line would deliver all the oil under its control, to the railroad company for transportation. The pipe line performed its part of the agreement, and brought suit to recover the price agreed on, and it was decided that the railroad company could not set up the defense that the contract was *ultra vires*.[9]

Another case presented an *ultra vires* railway lease partially executed, and it was decided that where a lease of this kind for twenty years was made, and the lessors resumed possession at the end of five years, and the accounts for that period were adjusted and paid, a condition in the lease to pay the value of the unexpired term is void, the case not coming within the principle that executed contracts originally *ultra vires* shall stand good for the protection of rights acquired under a completed transaction.[10]

[9] Oil Creek & A. R. R. Co. v. Penn. Transp. Co., 83 Pa. St. 160.

[10] Thomas v. R. R. Co., 101 U. S. 69; and see generally Spring Co. v. Knowlton, 103 U. S. 49; Oneida Bank v. Ontario Bank, 21 N. Y. 490; White v Franklin Bank, 22 Pick. 181; Dill v. Wareham, 7 Metc. 438; Whitney v. Peay, 24 Ark. 22; Foulke v. San Diego, etc. R. Co. 51 Cal. 365; Phila. Loan Co. v. Towner, 13 Conn. 249; Brooks v. Martin, 2 Wall. 70.

EFFECT OF A PLEA OF GUILTY IN CASES OF FELONY.

PEOPLE v. LENNOX.*

CRIMINAL PROCEDURE. [*Plea of Guilty*]—*Motion to Withdraw Plea After Assessment of Punishment too Late.*—A defendant who pleads guilty to an indictment cannot, after his punishment has been assessed in pursuance of the statute, insist on withdrawing his plea and pleading not guilty, even in a capital case where his punishment has been assessed at death.

Appeal from a judgment and certain orders of the superior court of Los Angeles county entered against the defendant. The opinion states the facts.

John F. Godfrey, for the appellant; *E. C. Marshall, attorney general*, for the respondent.

MYRICK, J., delivered the opinion of the court:

The defendant was accused by information of the crime of murder. He was arraigned and pleaded not guilty, and the cause was set for trial. On the day set, September 4, 1884, the defendant, by his counsel, moved the court for leave to withdraw his plea of not guilty, and offered to plead *nolo contendere*. The motion was objected to by the district attorney, and was denied by the court. The defendant then asked leave to withdraw his plea of not guilty, which motion was granted. The defendant then pleaded guilty. Thereupon the court proceeded to hear evidence for the purpose of fixing the degree of the crime. Witnesses were examined, as well as those offered by the defendant as for the prosecution—some thirty in all. After hearing the evidence, the court fixed the degree of the crime to be murder in the first degree, and set September 11, 1884, as the day on which the punishment should be determined. On that day, the court, referring to § 190, penal code, and to the testimony which had been taken, declared to the defendant that the discretion to be exercised by the court, as to whether the punishment should be death or imprisonment for life, was the same as that to be exercised by a jury determining the same question, and that "from the evidence in this case I can find no circumstances of mitigation, but many of aggravation; the fact that your passions were inflamed with strong drink can furnish no extenuation. I must, therefore, adjudge that you be taken hence, by the sheriff of this county, to its county jail, where you will be, by him, retained until at a time and place to be hereafter determined by the court you will be hanged by the neck until you are dead."

Thereupon, and before the clerk had entered the judgment in the record, the defendant's attorney moved the court to permit the defendant to withdraw the plea of guilty and to plead not guilty, on the ground that the defendant had been misled in withdrawing his plea of not guilty and pleaded guilty. The reasons given in the record why the defendant deemed himself misled in pleading guilty were because his father, a deputy sheriff, and his attorney expressed to him the belief that if he pleaded not guilty, and was tried by a jury, the jury would find him guilty, and affix the death penalty; whereas, if he pleaded guilty, they believed the court might, in the exercise of its judgment, fix the punishment at imprisonment for life.

We see no error. The defendant, with his own knowledge of what he had done, with the concurrence of his attorney and such others as he sought advice of, pleaded guilty to the charge; the court, in compliance with § 1,192, penal code, determined the degree, and, after hearing evidence, determined, in compliance with § 190, penal code, the punishment. All the proceedings seem to have been according to law. Not until after the court had performed its duty of fixing the punishment did the defendant express any desire to reconsider his plea of guilty.

The point that the defendant could not, by pleading guilty, waive a trial by jury, is answered adversely to him by the decision in People v. Noll, 20 Cal., 164.

The judgments and the orders appealed from are affirmed and the cause is remanded to the superior court of Los Angeles county, with directions to proceed according to law in carrying the sentence into execution.

SHARPSTEIN, J., and THORNTON, J., concurred.

*S. C., 6 West Coast Repr. 691.

NOTE.—Some statutes provide for the withdrawal of pleas of guilty, and permitting the plea of "not guilty" or other pleas to be substituted; but this must be done previous to judgment. For instance, in Iowa, it is en-

acted that "at any time before judgment the court may permit the plea of guilty to be withdrawn, and other plea, or pleas, substituted." Miller's Code of Iowa, 1880, p. 1022, § 4362. This practice has been recognized in two cases by the Supreme Court of that State. State v. Kraft, 10 Iowa, 330, 331; State v. Oehlslager, 38 Iowa, 297, which follows last case. But a plea of guilty cannot be withdrawn after sentence under that statute. State v. Buck, 59 Iowa, 382; s. c., 13 Northwestern Repr. 342.

It is discretionary with the trial court in most cases, whether a plea will be allowed to be withdrawn and another substituted. It is held to be addressed to the sound discretion of the court, and nothing short of a clear abuse of it can be assigned as error. Phillips v. People, 55 Ill. 429. And such is the holding in People v. Lee, 17 Cal. 76, 80, and Rex v. Brown, 17 L. J. M. C. 145. The prisoner is not entitled to withdraw a plea of not guilty as a right. People v. Lewis, 64 Cal. 401, 403; s. c., 1 West Coast Rep. 131, 132; s. c., 17 Rep. 361; 5 Crim. Law Mag. 627. See further Norton v. People, 47 Ill. 468; Kinlock's Case, Foster's Crown Law, 16; Page v. Commonwealth, 27 Gratt. 954; Conover v. State, 86 Ind. 99; Hensche v. People, 16 Mich. 46; Sanders v. State, 97 Ind. 147; s. c., 4 Crim. Law Magazine, 359; Wickwise v. State, 16 Conn. 477; Sunday v. State, 14 Mo. 417; Rex v. Fitzharris, 8 Howell St. Tr. 243, 325; Norwood v. State, 45 Md. 68, 76; 1 Chitty Crim. Law, 436; State v. Kring, 71 Mo. 551; 1 Bishop Crim. Proc., §§ 747, 798; 2 Archb. Crim. L. 334; 2 Hawk, P. C. 469; 2 Hale P. C. 225. There is, however, this qualification to the rule: If the defendant desires to plead something that would be a good defense, and which has taken place since the last continuance, then he has an absolute right to do so. State v. Salge, 2 Nev. 321, 324. For instance, the court could not deny a prisoner the right to plead a pardon which had been granted since the last continuance of the cause. Id. And where there is evidence sufficient to raise a doubt of the sanity of defendant at the time the plea of guilty was interposed, he should, as a right, be permitted to withdraw his plea of guilty and substitute "not guilty." People v. Scott, 59 Cal. 341. So where a youth, a foreigner, ignorant of the language and institutions of this country, upon being charged with a capital offense, says that he is guilty, but says so under circumstances which show that he is ignorant of his rights, it is error for the court, without appointing counsel or submitting the case to the jury, to accept his statement as a plea of guilty, and to enter judgment and pass sentence of death. Gardner v. People, 106 Ill. 76; s. c., 4 Crim. Law Mag. 881. And even where the defendant, after pleading guilty, has moved in arrest of judgment, and that motion overruled, should justice require, the court should permit, before judgment rendered, a withdrawal of the plea of guilty, and the substitution of the plea of not guilty. 1 Bish. Crim. Proc. § 747. Thus, in State v. Cotton, 24 N. H. (4 Foster,) 143, the defendant pleaded guilty and moved in arrest of judgment. He also moved that if judgment should not be arrested, that he be permitted to withdraw his plea of guilty. Eastman, J., thought the motion to withdraw rather novel, but said it is "one to be addressed to the discretion of the common pleas, and is proper for their consideration, and the consideration of the prosecuting officers." So where a defendant inadvertently pleaded guilty to one indictment when intending to plead guilty to another, the plea being entered through misapprehension, the mistake should be corrected. Davis v. State, 20 Ga. 674. In any case where justice requires it, the plea of guilty should be permitted to be withdrawn. 1 Bish. Crim. Proc., § 747.

But if the proposed plea to be substituted is not sufficient, in law, as a defense, the court may refuse the withdrawal, as in pleading a prior judgment which has been reversed by the Supreme Court. State v. Salge, 2 Nev. 321, 324. In all cases after the plea of not guilty, the defendant must obtain leave of court to file another in lieu thereof. And in Massachusetts it has been held that after plea of not guilty and a trial thereon in the police court, the defendant cannot file another plea in the Superior Court on his appeal without leave of court. Commonwealth v. Lannan, 13 Allen, 563; Commonwealth v. Hagarman, 10 Allen, 401.

In the recent case of Mostronda v. State, 60 Miss. 87, the defendant pleaded guilty to the charge of unlawful retailing liquors; but before sentence had been passed upon him, he moved the court for leave to withdraw his plea of guilty. In support of his motion he filed an affidavit to the effect that upon a previous occasion he had pleaded guilty to a similar offense and had been sentenced with the mildest penalty allowed by the law, and that he filed his plea of guilty in the belief that the court would be as lenient with him in this case as the former, but that since entering his plea he had heard a rumor that he would be more severely dealt with than before, and therefore he wished to withdraw his plea. The affidavit did not aver that he was innocent of the offense with which he was charged. The court refused to grant the motion. On appeal this was held to be a proper exercise of discretion. But see State v. Stephens, 71 Mo. 535; s. c., 10 Cent. L. J. 497, where it is held that if a defendant enters a plea of guilty under the belief induced by something said or done by the judge, that by so doing he will receive a punishment less severe than the maximum allowed by law, he should not afterwards be sentenced to the maximum, but should rather be permitted to withdraw his plea, and file a plea of not guilty. See State v. Kring, 71 Mo. 551, where this case is followed.

In United States v. Rayaud, 15 Reporter, 200, defendants were indicted for violations of internal revenue laws and pleaded guilty, but the district attorney delayed moving for sentence until a subsequent term in order to allow defendants an opportunity to endeavor to affect a compromise at Washington. The commissioner of internal revenue having rejected the offer of compromise, the district attorney, moved the court for sentence, and the prisoners then made a motion for leave to withdraw their pleas of guilty, and substitute not guilty. The motion was denied.

In a proper case, where a judgment on a plea of guilty has been reversed, the prisoner is entitled to plead not guilty. Commonwealth v. Ervine, 8 Dana (Ky.), 30, see Whart. Crim. Pl. & Pr. (8th ed.), p. 285, § 414.

But where, as in the principal case, judgment has been pronounced, the plea of guilty cannot be withdrawn and another substituted. Reg. v. Tell, 9 Car. & P. 346, 348; State v. Buck, 59 Iowa, 382; s. c., 13 N. W. Rep. 342.

WEEKLY DIGEST OF RECENT CASES.

1. HUSBAND AND WIFE— [*Suretyship*]—*Effect of Wife Holding Note of Husband Consenting to His Discharge in Bankruptcy.*—1. Where a wife holds as her separate property the note of her husband and his brother as surety, and upon her husband's becoming bankrupt proves up the note as a claim against his estate and thereafter consented to his discharge, such action will not have the effect of releasing the liability of the surety. *Clark v. Clark*, S. C. Mo., June 8, 1885.

2. ———. *Validity of Contract of Suretyship in Case of Loan by Wife to Husband.*—At common law the wife's chattel became the property of the husband by virtue of the marital relation. But he could waive this right in her favor and where, instead of asserting such claim, he borrows her money and executes a note therefor which he procures to be signed by his brother as surety such contract of suretyship is valid and binding. *Ibid.*

3. ———. [*Wife's Real Estate—Husband's Debts.*] *When Wife's Real Estate Exempt from Husband's Debts, although He Aid Her in Procuring it.*—A husband may aid his wife in procuring the title to real estate, and the same cannot be subjected to the payment of his debts, provided he does not furnish any of the means required to pay for the real estate. [In the opinion of the court by Seevers, J., it is said: "In Shields v. Keys, 24 Iowa, 298, it was held that a married woman could acquire real estate; and a purchase by her on credit, in reliance on the earnings of a minor son, with which to pay for it, was upheld. And in Corning v. Fowler, 24 Iowa, 584, it was held that a creditor of a husband is not entitled to have established a lien on a wife's lands for improvements made by the husband thereon, nor can the same be subjected to the payment of the creditor's claim to the extent of such improvements. The logical result of these two cases is, that a husband may aid his wife in procuring the title to real estate, and the same cannot be subjected to the payment of his debts, provided he does not furnish any of the means required to pay for the real estate. One man may aid another by advice, and by correspondence bring about the sale and purchase of real estate. But he has no such interest in such real estate as his creditors can subject to the payment of debts. A husband may aid his wife to the same extent, and that is all that was done by E. S. Gaylord in this case."] *Second Nat. Bank v. Gaylord*, S. C. Iowa, June 13, 1885; 24 N. W. Repr. 56.

4. INJUNCTION. [*Title*]—*Does not Lie where Complainant's Title is Doubtful.*—A bill in equity will not lie to enjoin against the use of an alley before the legal title to the alley has been established by common law proceedings. [In the opinion of the court by Clark, J., it is said: "In the proofs the parties conformed to the pleadings, and proceeded as if the action was at law, in ejectment or trespass; the whole contention, as shown by both the pleadings and proofs, was upon the legal rights and claims of the parties; no irreparable injury was shown; no clear right right to the subjects in dispute established; no ground for equitable relief disclosed. Where rights which are legal are asserted on one side and denied on the other, the remedies are at law; they cannot be settled under equity forms; this is undoubtedly the general rule. In actions respecting real property, therefore, if there be no equitable ground of relief involved, the rights of the parties must be determined at law; when thus determined, or when they are admitted in the pleadings, or otherwise clearly appear, an equity based upon that right, superinduced by the acts of the parties, may be asserted, and a decree for equitable relief made; thus equity is made the means, not of establishing the legal right, but of giving adequate protection in the enjoyment of it when thus established. No irreparable injury has been shown, and it does not yet appear that a multiplicity of suits must result under proceedings at law; all parties in interest may be put upon the record in a single suit, and *non constat*, that the trial and determination of that suit may not end the controversy; the right to equitable relief may follow, if any equity is superinduced by the acts of the parties; but the interference of equity in such a case rests, as stated by Chancellor Kent, in Gardner v. The Village of Newbury, 2 Johns. Ch. Rep. 164, 'on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, upon just and equitable grounds, ought to be prevented.' To the same effect are the cases of North Penna. Coal Co. v. Snowden, 6 Wright, 488; Norris' Appeal, 64 Pa. St. 275; Tilmes v. March, 67 Id., 507; Haines' Appeal, 73 Id. 169, and Grubb's Appeal, 90 Id. 228. In Rhea v. Forsythe, 1 Wright, 503, Mr. Justice Woodward, after a review of the cases, concludes as follows: "From these and many more authorities which might be cited to the same effect, it is apparent that where the plaintiff's right has not been established at law, or is not clear, but is questioned on every ground on which he puts it, not only by the answer of the defendant, but by proof in the cause, he is not entitled to remedy by injunction. It is not enough that he is able to produce some evidence of his right when there is conflicting evidence that goes to the denial of his rights. When the emergency is pressing, and the injunction affidavits disclose a *prima facie* right in the plaintiff, the proper practice, I apprehend, is for the court to interfere by special injunction and stay the defendant's hand until the right has been tried at law.' Even in cases confessedly within the jurisdiction, as partition, equity will not interfere if the complainant's title be denied until he has vindicated it at law; the court may retain the bill, however, until that has been done: 2 Atk. 280; Coxe v. Smith, 4 Johns Chan. Rep. 271; North Penna. Coal Co. v. Snowden, *supra*. A further citation of authorities upon a point so well settled is certainly unnecessary."] *Washburne's Appeal*, S. C. Pa., Apr. 7, 1884; 15 Pittsb. Leg. Jour. (N. S.) 354.

5. INSURANCE. [*Agency.*]—*Waiver by Agent of Condition in Policy Touching Additional Insurance.*—An insurance company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of premises,

take applications and forward them to the home or branch office, deliver policies, and collect premiums; and when a party insured notifies such agent of his intention to take additional insurance, and when he has obtained such insurance requests him to inform his company of that fact, the company cannot, after a loss, hold the policy issued by it void because its written consent to the taking of such additional insurance was not indorsed on the policy, as provided therein. [The court examine: Westchester F. Ins. Co. v. Earle, 33 Mich. 143; N. Y. Cent. Ins. Co. v. Watson, 23 Mich. 486; Western Ins. Co. v. Riker, 10 Mich. 279; Security Ins. Co. v. Fay, 22 Mich. 467; Allemania Ins. Co. v. Hurd, 37 Mich. 11.] *Kitchen v. Hartford Fire Ins. Co.*, S. C. Mich., June 3, 1885; 23 N. W. Repr. 616.

6. ——. [*Fire—Mistake of Law.*] — *When Members Relieved from Payment of Premium Notes on the Ground of Mistake of Law.*—Where all of the parties insured in a mutual company, including those who had suffered loss by fire, when they took the insurance understood and agreed that they were liable only to the amount of their premium notes, when, under the statute, they became liable, in the event of the company becoming insolvent and a receiver being appointed, to pay all assessments laid by the receiver for the purpose of paying the losses and liabilities of the company, and the services and expenses of the receiver, in proportion to the amount of their insurance or interest in the company, they will be entitled to relief, on the ground of a mistake of law, when the company becomes insolvent, and the receiver appointed attempts to enforce their statutory liability. [The question arose upon a demurrer to a bill in equity by which the above facts were admitted. In the opinion of the court by Champlin, J., it is said: "This is a mutual company. The question at issue as to the right of the receiver to assess beyond the premium notes affects no one but the members, and these members entered into contract relations with each other upon the express understanding and agreement that they should not be assessed beyond the amount of their premium notes. There is nothing illegal in such a contract, although the law does provide that in case the company became insolvent there might be assessments made beyond and independently of the premium notes to pay such loss. This provision of the law was made for the benefit of the individual members, and the individual members can waive a benefit given by statute. The case is much stronger when, in ignorance of such law, they mutually agree that the premium note shall be the limit of each member's liability. If the agent had intentionally misrepresented to the complainant the facts in a material point, which induced him to enter into the contract he would have been entitled to relief. In Lycoming Fire Ins. Co. v. Woodworth, 83 Pa. St. 223, Mr. Justice Gordon said: 'It is true that one insuring in a company, formed on the mutual plan, is bound to inform himself of the rules and regulations of such company. Mitchell v. Insurance Co., 51 Pa. St. 402. But it is also true that, as to those outside of it, such company occupies no other or better position than one organized on the stock plan. As to one dealing for insurance, such a company is bound, as any other, by the representations of its agent in the making of the contract, for it cannot assume the advantages of his acts, and avoid the disadvantages. The maxim, '*Qui sentit commodum, sentire debet et onus*,' is said by Justice Sharswood, in Mundorff v. Wickersham, 63 Pa. St. 87, to embrace a principle which pervades the law in all its branches. It follows that this company could not profit by the fraud of its agent in inducing the plaintiffs to enter into a contract which they would not have entered into had it not been for such fraud, and it does not help the matter that they were thus made members of the company, for such membership arises from, but does not precede, the contract. Under the allegations of the bill it would operate as a great wrong upon the complainant to extend his liability beyond the amount of the premium note signed by him, which it was expressly agreed should limit the utmost extent of his liability; and as all of the members understood their contract in the same way, there is nothing wrong or inequitable in enforcing the contract as made." Sherwood, J., concurred. Cooley, C. J., said: "I assent to the conclusion reached by Mr. Justice Champlin in this case, upon the express ground that it stands admitted by the record before us that all the parties who became members of the insurance company in question did so upon the express understanding and agreement that their liability was to be limited to the notes given by them respectively." Campbell, J., said: "I do not think relief can be granted against a statutory liability."] *Maclem v. Bacon*, S. C. Mich., June 17, 1885; 24 N. W. Repr. 91.

7. JUDGE. [*Recusation.*]—*Appointment in Suit by Judge who had been of Counsel not Void if made Prior to Recusation.*—The appointment of an attorney to represent absent heirs in a probate cause by a judge who had been counsel of the executor but had not been recused is not void. Such judge would not become incompetent to make such an order until he had been recused, or had recused himself for cause. *Heirs of Ely v. Noble*, S. C. of La., Monroe, June, 1885.

8. JURISDICTION. [*State Inland Waters.*]—*Extends to a Boat Tied to Opposite Shore of Another State.*—A, opposite to Ravenswood in Jackson county, West Virginia, on the Ohio side of the Ohio river sold spiritous liquors in a boat, which was afloat on the river beyond low water mark, but fastened by a rope to the bank. It was held that the offense, if one, was committed within the jurisdiction of West Virginia; that the jurisdiction of West Virginia is co-extensive with the water of the Ohio river while confined within its banks; and that the State of West Virginia in the proper county has jurisdiction of offenses committed on a boat, which is afloat on the Ohio river while confined within its banks, whether such boat is or is not fastened to some object on the bank. [The court cite: Handley's Lessee v. Anthony, 5 Wheat. 375, and Garner's Case, 3 Gratt. 655.] *State v. Plant*, 25 W. Va. 119 (adv. sheets).

9. ——. [*Supreme Court of Illinois.*]—*When Question of Freehold is not Deemed to be Involved.*—Where the scope of the litigation in divers bills and cross-bills, heard together, is the establishment of liens on real estate, by mortgage or otherwise, and their enforcement, the redemption from such liens and the resistance of such redemption, all on the part of creditors, there being no adverse claims of title arrayed against each other of the various parties, no question of freehold is involved, and a writ of error to review the proceedings is properly sued out of the Appellate Court instead of the Supreme Court. A finding that the party executing a deed of trust on land was at the time the owner thereof, is not a decision as to the free-

hold, where there is no claim of an adverse title. Such finding amounts to no more than that there was a valid deed of trust made. [In the opinion of the court by Mr. Justice Sheldon it is said: "We regard the scope of the whole litigation as involving but the enforcement of liens on real estate, by mortgage or otherwise, the establishment of such liens, the release of and redemption from them, and the resistance of such redemption—all on the part of creditors, there being no adverse claims of title arrayed against each other. In the determination of such questions no freehold is involved, as this court has frequently decided. Carbine v. Fox, 98 Ill. 146; McIntyre v. Yates, 100 Id. 475; Conkey v. Knight, 104 Id. 337. We said in Chicago, Burlington & Quincy R. Co. v. Watson, 105 Ill. 222: 'A freehold is never involved, within the meaning of the statute, except where the primary object of the suit is a recovery of a freehold estate the title whereof is directly put in issue, and where the suit, if prosecuted to a final determination, will, by virtue of the judgment or decree rendered therein, as between the parties, result in one gaining and the other losing the estate.' No such result follows here by virtue of the decree, but the effect is to subject the property to be sold, for the satisfaction of the liens upon it."] *Chicago, etc. Land Co. v. Peck*, 112 Ill. 408 (adv. sheets).

10. LANDS, PUBLIC. [*Pre-Emption.*]— *Certificate of Pre-Emption not Subject to Cancellation by Commissioner.*—A certificate of purchase issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law, cannot be canceled or set aside by the land department for alleged fraud in obtaining it; but, in such case, the government must seek redress in the courts where the matter may be heard and determined according to the law applicable to the rights of individuals in like circumstances. [Deady, J., in the opinion of the court, says: "Several of the State courts have decided that the certificate of purchase, when issued in due form, for land subject to entry, is beyond the power of the commissioner, otherwise than on a direct appeal from the register and receiver. In Perry v. O'Hanlon, 11 Mo. 585, the Supreme Court of Missouri held that a cancellation of a pre-emption certificate by the commissioner was a nullity. To the same effect is the ruling in Prill v. Stiles, 35 Ill. 309; Cornelius v. Kissel, 58 Wis. 241."] *Smith v. Ewing*, U. S. Cir. Ct., Oregon, June 1, 1885, 6 West Coast Repr. 653.

11. LIBEL. [*Jurisdiction.*]— *Local Jurisdiction of Action for.*—Where a newspaper containing libelous matter is printed in G. county and mailed to subscribers in said county, and is also mailed to subscribers in T. county and sold by agents in the latter county, a suit for damages for such libel may be brought in T county. In the opinion of the court Willie, C. J., says: "The general rule is that every person against whom an action is brought must be sued in the county of his residence. Among other exceptions is the following: "Where the foundation of the suit is some crime, or offense, or trespass, for which a civil action in damages may lie, in which case the suit may be brought in the county where such crime, or offense, or trespass was committed, or in the county where the defendant has his domicile." Rev. Stats., art. 617. It may be committed by either making, writing, printing, publishing, selling or circulating the malicious statement with intent to injure another. By reference to articles 619-620-621, it will be seen that three distinct methods by which the offense may be committed are pointed out. It will not be necessary for us to compare these definitions with those which are given by the common law. It is sufficient to say that within the meaning of publishing and circulating a libel are at least contained all acts going to make up the offense of publishing a libel known to the laws of England and of our sister States. No doubt can arise upon the proof or pleadings in this case but that the appellant sold and distributed the copy of their paper which contained the alleged malicious statement. Such sale and distribution constituted publication at common law; it constitutes circulation under our penal code. As under the former, publication of a libel was an offense indictable wherever it occurred, so under our law circulation of a libel is an offense committed in any place where the libel is sold or distributed. 1 Bish. Cr. Proc., secs. 53, 57, 61; Commonwealth v. Blanding, 3 Pick. 304; Rex v. Gridwood, Leach, 142; Rex v. Burdett, 4 Barn. & Ald. 95; Penal Code, arts. 616-621. The fact that the crime of libel may have been completed by a publication of the paper in Galveston county does not make it any less a crime to circulate the number containing the alleged libelous article in other places. By the common law the sale of each copy is a distinct publication (Odgers on Libel, 532), and hence a distinct offense, and the prosecutor may at least choose for which of the distinct offenses he will call the guilty party to account. A copy of the paper may be first sold to A, then one to B and another to C, but because the publication is completed by selling to A, the government is not bound to select that particular fact as the one upon which it will rely to prove the completion of the offense. It may indict for either of the sales, and as it makes no difference which was first in point of time; so for the same reason it is unimportant in what place the publication first took place. These principles are so well grounded in the law of libel that they would not have been noticed at such length but for the zeal and earnestness with which distinguished counsel have urged upon the court a contrary doctrine. Under our penal code each act of either making, publishing or circulating a libel, being a separate offense, we must hold that the circulation of the *News* containing the libelous statement in Travis county was such an offense, no matter what may have been done with reference to it in the county of Galveston. The offense having been committed in Travis county, and being indictable there, the present civil action for damages was properly brought in that county."] *Belo v. Wren*, S. C. Tex., 1884; 5 Tex. Law Rev. 149.

12. MALICIOUS PROSECUTION. [*Malice*]—*Want of Probable Cause not Conclusive Evidence of Malice.*—Whilst in an action for damages for malicious prosecution, want of probable cause on the part of the prosecutor is *prima facie* evidence of malice, it is not conclusive. [In the opinion of the court it is said by Gordon, J.: "As it is the duty of every citizen to aid in enforcing the criminal laws of the State against those by whom they are wilfully disobeyed, so is it the business of our courts of justice to see that the person thus undertaking to vindicate the law shall not suffer in consequence of such an attempt, even though it may have proved abortive. Hence it is, that it has ever been held that an action for malicious prosecution can be maintained only where the plaintiff can make it

appear. 1. That the defendant in his attempted prosecution had no probable cause upon which to found it, and 2, That he was actuated by malice. If the defendant is able to show probable cause, that is sufficient for his protection, and, in that case, his motive for the prosecution is not to be considered. If there be no such case shown, then the question is one of malice, and if the proofs exhibit an absence of this essential element of the plaintiff's case, the action cannot be legally sustained. Deitz v. Lanfitt, 13 P. F. Smith, 234; Bernar v. Dunlay, 13 Norris, 329. Whilst a want of probable cause is *prima facie* evidence of malice it is by no means conclusive, since, where it appears that there is a reasonable ground for the belief of guilt, without regard to what induced that belief, it ought to be regarded as a justification of the defendant's action, for as we held in Smith v. Ege, 2 P. F. Smith, 419, and Seibert v. Price, 5 W. & S. 438, the question turns not upon the actual state of the case, but upon the honest and reasonable belief of the party prosecuting. So where it appears that the defendant acted merely through mistake, or where the prosecution resulted from the mistake of the justice of the peace before whom the information was made, the action cannot be maintained:" 2 Esp. N. P. 122; Stark. Ev., Vol. 2, 688.] *Gilliford v. Windel*, S. C. Pa., Jan. 5, 1885; 15 Pittsb. Leg. Jour. (N. S.) 262.

13. MARRIED WOMAN. [*Community*]—*Not Responsible for Funds Received During Community by Husband, though Used by Her.*—A married woman cannot be held responsible as a *negotiorum gestor*, by implied contract, during the existence of the community, even under a showing that she had made use of funds received by her husband for account of a minor. *Glass v. Meredith*, S. C. La., Monroe, June, 1885.

14. ——— [*Separate Estate*]—*Liability of Wife's Separate Estate for Debts Contracted before Marriage.*—By an ante-nuptial settlement it was provided that any property to which the wife, or the husband in her right, should become entitled "at any time during the intended coverture," except jewels and articles of a like nature, which it was declared should be for the separate use of the wife, should vest in the trustees of the settlement. The wife was sued without her husband for a debt contracted before the marriage, and the creditor obtained judgment and issued execution against her separate estate, seizing a large quantity of jewelry, most of which had been given to her as wedding presents before her marriage. On an interpleader issue between the husband and the execution creditor: *Held* (affirming the judgment of the court below), that the articles seized were property to which the husband would have become entitled in right of his wife during the coverture but for the exception in the settlement, which made them the separate property of the wife, and therefore that they were rightly seized under the execution. *Williams v. Mercier*, House of Lords, Nov. 4, 1884; 52 Law Times Rep. (N. S.) 662.

15. MORTGAGE. [*Fraudulent Conveyance*]—*Mortgage for More than Debt Due Fraudulent.*—A mortgage given for a sum larger than the legitimate indebtedness, in the absence of explanatory evidence, is a badge of fraud, and may, in and of itself, be sufficient to establish a fraudulent purpose. Mortgage *held* void as to existing creditors. In the opinion of the court Seevers, J., said: "There is no certain and direct evidence that the mortgagor was indebted in any sum whatever to his wife at the time the mortgage was executed, but there is evidence showing that several years prior thereto she had let him have not exceeding $1,250. The mortgagor then being in failing circumstances, and actually insolvent, executed to his wife a mortgage for $3,000, and gave her selected notes and accounts of the supposed value of at least $2,000. It has been held that a mortgage given for a sum larger than the legitimate indebtedness, in the absence of explanatory evidence, is a badge of fraud, and may, in and of itself, be sufficient to establish a fraudulent purpose. Davenport v. Cummings, 15 Iowa, 219; Butts v. Peacock, 23 Wis., 359; Tripp v. Vincent, 8 Paige, 176; Beeler's Heirs v. Bullitt's Heirs, 3 A. K. Marsh, 280; Lynde v. McGregor, 95 Mass., 172; Wood v. Scott, 55 Iowa, 114; S. C. 7 N. W. Rep. 465." *Taylor v. Wendling*, S. C. Iowa, June 13, 1885; 24 N. W. Rep. 40.

16. ———. [*Description*]—*Variance Between Date of Notes Declared on and those Described in Mortgage, when Immaterial.*—A discrepancy between notes sued on and notes described in the mortgage sought to be enforced, in the suit, on property described in the petition and mortgage, consisting merely in the date "July" instead of "June," is insufficient to defeat a claim for the enforcement of the mortgage; especially when there is no pretense that the mortgagor has issued other outstanding notes identical with those described in the mortgage. *Thompson v. Lowry*, S. C. La., Monroe, June, 1885.

17. MUNICIPAL CORPORATIONS. [*Ultra Vires*] *Lease Made Without Specific Authority in Charter, Ultra Vires.*—Municipal corporations can exercise only powers specially delegated or such as are incidental to those granted, or flow from them by necessary implication. The mayor and council of an incorporated town, therefore, cannot lease from a parish (county) a ferry, and bind the town to pay the rent fixed, unless the charter of the town specially authorizes such a contract. *Millsaps v. Mayor & Council of Monroe*, S. C. La., Monroe, June, 1885.

18. ———. [*Negligence—Notice*]—*What Notice of Defect Sufficient to Charge City—Notice to Marshal not Notice to City.*—When a sidewalk, which was originally constructed in a proper manner, afterwards becomes out of repair, and an injury is thereby occasioned, the municipal corporation, whose duty it is to keep it in repair, is liable therefor if it had actual notice of the defect in such time as that, by the exercise of reasonable diligence, it might have repaired it and thereby have prevented the injury; or, if the defect was of such a nature, and had existed for such a period of time as that, by the exercise of ordinary care and diligence in the discharge of its duties, it would have learned of its existence in time to have prevented the injury. Notice of a defect in a sidewalk conimumcated to a city marshal is not such notice to the city as will render it liable for an injury resulting therefrom. Since the marshal is charged with no duty in respect of the streets and sidewalks. [The court cite: Rice v. Des Moines, 40 Iowa, 638; Montgomery v. Des Moines, 55 Iowa, 101; S. C. 7 N. W. Repr. 421.] *Cook v. Anamosa*, S. C. Iowa, June 8, 1885; S. C. 23 N. W. Repr. 907.

19. NEGLIGENCE. [*Presumption.*]—*Presumption of Care on the Part of Plaintiff Arising from Instinct*

of Self Preservation when not Entitled to Weight. In an action against a railway company for a negligent injury, court instructed the jury in these words: "The jury may take into consideration in weighing the evidence, the hazardous nature of the work in which the brakeman was employed, and give due weight to the instincts and presumptions which naturally lead men to avoid injury and preserve their own lives." The giving of this instruction is held to be error, Adams, J., saying: "The instinct of self-preservation, planted in all persons may, in a proper case, be allowed some weight as raising an inference of care. Way v. Illinois Cent. R. Co., 40 Iowa, 345. But where the party who has the burden of proving care can show by direct evidence what care was exercised, he should, we think, show it by such evidence; and if the direct evidence shows care, or a want of it, there is no room for a mere inference. The plaintiff was able to show by direct evidence what care he exercised. The case is different from Way v. Illinois Cent. R. Co., above cited. We think that the instruction is erroneous." *Dunlavy v. Chicago etc. R. Co.*, S. C. Iowa, June 8, 1885; 23 N. W. Repr. 911.

20. ——. ——. *Railway Station Platform Higher than Steps of Coaches.*—It is negligence in a railway company to have a station platform higher than the steps of passenger coaches and to require in consequence that passengers should enter from the platform into a baggage car, and thence to proceed to the coaches assigned to passengers; and the company is liable in damages for injury to passenger received while seeking to board a train in that manner at request of conductor. *Turner v. Vicksburg etc. R. Co.*, S. C. La., Monroe, June, 1885.

21. ——. [*Railway Companies.*] — *Accidents from Dissimilar Car Couplings, not Negligent.*—A brakeman was killed while attempting to couple a freight car belonging to the road by which he was employed, and a car belonging to another road, by reason, as alleged, of a dissimilarity in the couplings of the two cars. It is held that the railroad company was not liable. [In the opinion of the court by Orton, J., it is said: The difference in the elevation of the coupling irons of this foreign car and the caboose or other cars of the defendant's road, would not have been very easily or readily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when consenting to take this foreign car into its train. When the car and the caboose were brought nearly together, this difference could have been at least much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference, and, if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangers his own life by not seeing, observing, or knowing of such difference in the elevation of the coupling irons. Did not the intestate have the same, if not superior, means of knowing this difference, as or to that of the company? If the negligence of the intestate and that of the company, in this respect, are equally balanced, ought the plaintiff to recover? The duty of the company to know of this difference is not absolute, and it is not presumed to know of it as a matter of law. In Ballou v. Chicago, M. & St. P. Ry. Co., 54 Wis. 257; s. c. 11 N. W. Rep 559, the company was not held chargeable with knowledge of latent defects in the ladder of a foreign freight car by which the intestate in that case lost his life. Mr. Justice Cassoday said in the opinion: "Certainly, a railroad company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. To hold in such a case that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would, in many instances, operate as a prohibition upon interstate commerce." In Smith v. Potter, 46 Mich. 258; s. c. 9 N. W. Rep. 273, a brakeman's arm was crushed by his attempting to couple two foreign cars in the night-time, the dead-wood of one of which had fallen down below that of the other, and they passed by each other. A verdict for the defendant was ordered and the judgment was affirmed. The case is very much in point. See, also, Railway Co. v. Flanigan, 77 Ill. 365; Baldwin v. Railway Co., 50 Iowa 680; Hathaway v. Railroad Co., 51 Mich. 253; s. c., 16 N. W. Rep. 634; Railroad Co. v. Smithson, 45 Mich. 212; s.c., 7 N. W. Rep. 791. The liability of the railway company in such cases does not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which its employees may work, but upon its knowledge, actual or presumed, that such coupling appliances will not properly fit and connect with each other. I have therefore briefly compared the means of knowing this unfitness of the coupling apparatus which the company and the intestate had, in order to see whether the greater negligence should be imputed to the company rather than to the intestate. It does not appear from the complaint that the company had not in their employ at the time suitable persons to make inspection of all such foreign cars and ascertain their fitness to go into its trains, and it is presumed that such persons were so employed, and that other employees of the company caused the foreign car in this case to be upon the side track ready to be coupled to the caboose. If, therefore, there was any negligence on the part of any one in not ascertaining before-hand that their couplings would not meet, it must have been the negligence of the co-employes and fellow-servants of the intestate, for which the company is not liable. This case seems to be ruled in principle by the recent case of Whitwam v. Railroad Co., 58 Wis. 408; s.c. 17 N. W. Rep. 124. In that case the drawbar of the car was too short to be safely coupled to or detached from the engine, and the plaintiff, who was a brakeman, in attempting to detach the car from the engine, was injured. Mr. Justice Lyon said in the opinion: 'It seems to us that the gravamen of this action was the coupling of the Green Bay car to the engine with the short draw-bar, and this is, really, the only negligence charged in the complaint. It does not appear when, where, or by whom this Green Bay car was attached to such engine, but the attaching of it, as well as the order detaching it therefrom, were manifestly the acts of the servants of the defendants, engaged in operating their railroads, and hence of the co-employes of the plaintiff, and therefore the defendants are not liable for the injury to the plaintiff resulting therefrom.' The case of Railway Co. v. Black, 88 Ill. 112, is perhaps more nearly in point both in facts and principle. In that case the complaint was that the coupling bars of a flat car, loaded

with iron, of one company, and of a caboose of another company, were of different heights, and the plaintiff, in stooping down between the cars to do the coupling, had his hand crushed between the bars. It is said in the opinion by Mr. Justice Sheldon that it was the plaintiff's own fault 'in not ascertaining the condition of the cross-bars before attempting the coupling;' and that 'from his experience as a switchman in the yard, and the frequent coming in of cars thus constructed from other roads, he had reason to suppose that the car in question was liable to have a draw-bar in the situation it was here, and it was his plain duty to examine and ascertain, as he safely might have done, what was the condition of the car in this respect before venturing upon the coupling." It seems to us plain enough that if there was any fault or negligence anywhere in this case, it was that of the intestate or his fellow-servants and co-employes, and the defendants are not liable. It is very sad and pitiful that so many deaths and severe personal injuries result from coupling cars; but this part of the employment of brakeman is extremely dangerous and hazardous, and especially when it becomes necessary to couple together cars coming from different roads with dissimilar coupling appliances; and the care necessary to be used increases in proportion to such danger, and the law exacts its exercise, or it will refuse redress."] *Kelly v. Wisconsin Central R. Co.*, S. C. Wis., June 1, 1885; 23 N. W. Repr. 890.

CORRESPONDENCE.

A LAST YEAR'S BIRD'S NEST.

To the Editor of the Central Law Journal:

Probably you will receive other inquiries besides this, concerning your remarkable denunciation of the United States Supreme Court for its decision in the Dred Scott case. It will, I am sure, interest many awyers to know in what points the American people have reversed that decision on a hundred battle fields. And it will be not less interesting to learn just on what points of law the court in that case went wrong. It is well enough to allow the newspapers to display their ignorance by repeating the unjust charge that Chief Justice Taney there decided that "the negro had no rights which the white man was bound to respect," but I take it for granted you, as well as every lawyer, knows better; and of course every observer of political events remembers that even in many Northern States the negro was not made a citizen for two and three years after the close of the war. In 1867 Ohio, by an immense majority, denied him the right of voting.

It is true the American people have changed the law since that decision was rendered, but I do not suppose you were serious in intimating that thecourt should have decided, not according to the law as it then stood, but as it was going to be at some indefinite time in the future. I cannot believe that you would have had the court override the law, because it did not happen to suit the views of one of the great political parties of the country.

The case is reported in 19th Howard, 691, Scott v. Sanford, and the chief points decided are:

The word "citizen," in the Constitution does not include one of the negro race.

(2) A negro cannot become a citizen of Missouri.

(3) The Declaration of Independence does not include slaves as a part of the people.

(4) The rights and privileges conferred by the Constitution upon citizens do not apply to the negro race.

(5) A slave is not made free by residence in a free State or territory.

(6) The Constitution should have the same meaning intended when it was adopted.

(7) The Constitution expressly affirms the right of property in slaves.

(8) The Missouri compromise was unconstitutional and void.

As I see no occasion for rebuking the court for laying the law as above, I hope you will not fail to throw some light on the subject; for if Mr. Hedricks had no better ground than that to denounce the court, it seems to me your expression of disappointment at his recent address is not well founded.

St. Louis. JULIUS ROBERTSON.

REMARKS.—We are not going into the Dred Scott Decision. That decision is as weary, stale, flat and unprofitable as a last year's bird's nest. The discussion might prove especially unprofitable to us, because an old subscriber of ours in East Tennessee threatens to discontinue his subscription if we do not avoid these irrelevant matters. We are, however, much obliged to our learned friend for telling us exactly what the Dred Scott Decision *did* decide, for we never knew before,—except that it decided something unpleasant to a majority of the American people. The decision was discreditable to the court by reason of its *length*, if for no other. If we had commenced reading the several opinions at the time they were delivered, we might possibly have completed the task by this time.—[ED. C. L. J.

JETSAM AND FLOTSAM.

BATTLE IN A COURT ROOM.—A press dispatch from Fort Worth, Texas, June 20, says: "A lively scene occurred in the district court yesterday during the Stevens' trial for the murder of Dr. Wallace. H. M. Furman, of counsel for the defense, objected to a question put by County Attorney Bowlin, who took offense at an after-remark of Furman's. Further exchange of warm words led to Furman striking the county attor ney a heavy blow on the head, and a fight ensued. The Judge left the bench to separate the two men, when Robert D. Wear, of counsel for the prosecution, took a hand in the fight, and, in reaching for Furman, struck the judge on the face by mistake. The jurors jumped to their feet and the utmost confusion and excitement prevailed for a few minutes. The sheriff at length enforced order and heavy fines were imposed by the court. The jury yesterday in the trial of Chas. Herrin for the murder of C. W. Barradall in Chase's drug store, June, 1884, announced that they were unable to agree and the Judge discharged them. They stood three for murder in the first degree, eight for second degree with five years' imprisonment.

THE CHIEF JUSTICE OF THE UNITED STATES IN AN ENGLISH COURT.—On Saturday last, says the *London Times*, Lord Coleridge and Mr. Justice Mathew came upon the bench accompanied by a gentleman whom Lord Coleridge introduced to the bar—all standing up—as the Chief Justice of the United States, who was assigned a seat by the side of the Lord Chief Justice, and was treated throughout with the highest marks of respect, their lordships handing to him the ancient documents which were cited in the interesting case appointed to be heard, and explaining to him the proceedings. The Chief Justice appeared to be very much amused and interested in the quaint ceremony which took place of the introduction and reception of the new queen's counsel.